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EDITOR'S NOTE

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ly 23, 1985

Title: Linda Wimberly, Petitioner
v.
Labor and Industrial Relations Commission of Missouri, et al.

Court: Supreme Court of Missouri

Counsel for petitioner: Levin, Julie

Counsel for respondent: Goldcourt, Michael L.

:ry	Date	Note	Proceedings and Orders
1	Jul 23 1985	G	Petition for writ of certiorari filed.
2	Aug 28 1985		DISTRIBUTED. September 30, 1985
4	Sep 10 1985	F	Response requested.
5	Oct 10 1985		Brief of respondents Labor & Industrial Relations Comm. of MO, et al. in opposition filed.
6	Oct 16 1985		REDISTRIBUTED. November 1, 1985
7	Nov 4 1985	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Mar 21 1986		Brief amicus curiae of United States filed.
9	Mar 26 1986		REDISTRIBUTED. April 18, 1986
10	Apr 4 1986	X	Brief of petitioner Linda Wimberly in reply to memorandum for the United States as amicus curiae filed.
11	Apr 21 1986		Petition GRANTED.
			**********
13	Apr 30 1986		Order extending time to file brief of petitioner on the merits until July 3, 1986.
14	Jun 13 1986		Record filed.
15	Jul 2 1986		Joint appendix filed.
16	Jul 2 1986		Brief of petitioner Linda Wimberly filed.
17	Jul 3 1986	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
18	Jul 3 1986		Brief amicus curiae of Equal Rights Advocates, et al. filed.
20	Jul 14 1986		Order extending time to file brief of respondent on the merits until August 15, 1986.
21	Aug 15 1986		Brief amicus curiae of United States filed.
22	Aug 15 1986		Brief of respondents Labor & Indus., etc., et al. filed.
23	Aug 22 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Sep 3 1986		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
25	Sep 12 1986		CIRCULATED.
26	Oct 6 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Scalia OUT.
27	Oct 6 1986		SET FOR ARGUMENT. Tuesday, December 9, 1986. (1st case) (1 hour).
28	Nov 24 1986	X	Reply brief of petitioner Linda Wimberly filed.
29	Dec 9 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-129

No. 85-

In the Supreme Court of the United States

October Term, 1985

LINDA WIMBERLY,
Petitioner,

vs.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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76 pp

QUESTION PRESENTED*

1. The State of Missouri denies unemployment compensation benefits to women who leave their jobs due to pregnancy and are denied reinstatement in those jobs even though they are available for and able to return to work. Does this denial violate 26 U.S.C. §3304(a)(12) which provides that "no person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy"?

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*All parties to the proceeding in the Missouri Supreme Court are listed in the caption.

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No. 85-

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

Petitioner prays that a writ of certiorari issue to review the judgment of the Missouri Supreme Court dated April 30, 1985.

OPINIONS BELOW

The initial decision of the Missouri Supreme Court is dated April 2, 1985 and is printed in Appendix A at pp. A1-A20. The two-justice plurality opinion is printed at pp. A1-A13. The concurring opinion of Justice Robert T. Donnelly is printed at pp. A14-A15. The dissenting opinion written by Justice Charles B. Blackmar and concurred in by two other justices is printed at pp. A15-A20. The initial decision is not officially reported.

The decision of the Missouri Supreme Court denying petitioner's Motion for Rehearing is dated April 30, 1985, and is identical to the initial decision of April 2, 1985, with the exception of a modified concurring opinion by Justice Robert T. Donnelly. This decision is officially reported at 688 S.W.2d 344 (Mo. 1985) and is printed in Appendix B at pp. A21-A23.[1]

The Missouri Supreme Court decision reversed the judgment of the Missouri Court of Appeals, Western District which is printed in Appendix C at pp. A23-A40.

The opinion of the Circuit Court of Jackson County Missouri, is printed in Appendix D at pp. A40-A45. The decision of the Labor and Industrial Relations Commission of Missouri is printed in Appendix E at pp. A46-A47. The decision of the Appeals Tribunal for the Division of Employment Security of Missouri is printed in Appendix F at pp. A48-A50. The determination of the deputy for the Division of Employment Security of Missouri is printed in Appendix G at pp. A51-A53.

JURISDICTION

The judgment of the Missouri Supreme Court reversing the Missouri Court of Appeals, Western District was entered on April 2, 1985. The judgment of the Missouri Supreme Court overruling Petitioner's Motion for Rehearing was entered on April 30, 1985. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

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1. The portions of the opinion which are duplicative of the April 2, 1985, opinion are not reprinted. The only pages that are reprinted are those that were modified in the April 30, 1985, order. Also included in Appendix B is the letter from the Clerk of the Missouri Supreme Court which contains the official notice of the Court's order denying Petitioner's Motion for Rehearing. (App. B at p. A21).

STATUTES INVOLVED

26 U.S.C. §3304(a)(12)

(a) Requirements—The Secretary of Labor shall approve any state law submitted to him, within 30 days of submission, which he finds provides that—

* * *

(12) No person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy. * * *

Mo. Rev. Stat. §288.050.1(1)

1. Notwithstanding the other provisions of this law, a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages for work insured under the unemployment compensation laws of any state equal to ten times his weekly benefit amount if the deputy finds:

(1) That he has left his work voluntarily without good cause attributable to his work or to his employer; * * *

STATEMENT OF THE CASE

Petitioner, Linda Wimberly, was employed by J.C. Penney Co., Inc. as a cashier. On August 23, 1980, Mrs. Wimberly, then seven months pregnant, requested and was granted a maternity leave of absence. The leave of absence policy of J.C. Penney Co., Inc. did not guarantee the reinstatement of an employee in the event that a position was not available when the employee was able to return to work.

On December 1, 1980, less than one month after her child was born, Mrs. Wimberly notified her employer that she was able to return to work. At that time, she was advised that no positions were available. On December 7, 1980, Mrs. Wimberly filed a claim for unemployment compensation benefits for the period beginning December 1, 1980. A deputy for respondent Division of Employment Security denied the claim of Mrs. Wimberly on the ground that she had "quit because of pregnancy", (App. at A53), and, therefore, pursuant to Mo. Rev. Stat. §288.050.1(1) (Supp. 1984), had voluntarily left her work without good cause attributable to the work or to her employer.

At every appropriate stage in this action, Mrs. Wimberly has asserted her federal rights under 26 U.S.C. §3304(a)(12). Mrs. Wimberly appealed the deputy's determination to the Appeals Referee and an evidentiary hearing was held. At the hearing, Mrs. Wimberly alleged that pursuant to 26 U.S.C. §3304(a)(12) and *Brown v. Porcher*,[2] a state is prohibited from denying unemployment compensation benefits to women who have left their jobs due to pregnancy and are denied reinstatement in those jobs when they are able to return to work. The Appeals Referee affirmed the deputy's determination (App. at A50), and review by the Labor and Industrial Relations Commission of Missouri was denied. (App. at A46).

In her Petition for Review of the administrative decision to the Circuit Court of Jackson County, Missouri, Mrs. Wimberly raised the federal question sought to be reviewed in this case, i.e. the applicability of 26 U.S.C. §3304(a)(12)(1982),[3] and the violation by respondents of

2. *Brown v. Porcher*, 502 F.Supp. 946 (D.S.C. 1980), affirmed as modified, 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983).

3. 90 Stat. 2667, 2679 (1976).

that federal statute by denying unemployment compensation benefits to her. The Circuit Court held that the decision of the Appeals Referee must be reversed in accordance with 26 U.S.C. §3304(a)(12) and *Brown v. Porcher*. (App. at A44-45).

Respondents appealed the decision of the Circuit Court of Jackson County, Missouri, to the Missouri Court of Appeals, Western District. Respondents contended that the Fourth Circuit Court of Appeals had misinterpreted the intent of Congress in enacting 26 U.S.C. §3304(a)(12) and proposed that the federal statute was intended to apply only to prohibit the presumptions that women are unavailable for work and unable to work during certain stages of their pregnancies. These presumptions had been struck down by the United States Supreme Court in *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), prior to the enactment of 26 U.S.C. §3304(a)(12) in 1976. Petitioner, Linda Wimberly, maintained that the intent of Congress was much broader than a mere codification of the *Turner* decision and was intended to prohibit the disqualification of benefits for women who left their jobs due to pregnancy and were denied reinstatement when they were able to return to work. In affirming the decision of the Circuit Court of Jackson County, the Missouri Court of Appeals held that Mo. Rev. Stat. §288.050.1(1) must be "construed and applied in conformity with the interpretation and construction applied to §3304(a)(12) under *Brown* in all cases involving female employees who are otherwise eligible for unemployment compensation benefits but who leave their employment for reasons related to pregnancy." (App. at A38).[4]

4. The Court of Appeals also modified the Circuit Court decision, limiting the recoverable benefits to the period of time in which an employee was "able and available to return to work but was denied reinstatement in her employment due to the unavailability of any job or work." (App. at A40).

The Missouri Supreme Court agreed to review the decision of the Missouri Court of Appeals on respondents' motion to transfer. The Missouri Supreme Court in a 4-3 decision found that the Fourth Circuit Court of Appeals had erred in its interpretation of 26 U.S.C. §3304(a)(12) and reversed the decision of the Missouri Court of Appeals. Recognizing that its decision was in direct conflict with the Fourth Circuit Court of Appeals, the court declared that it would not disavow a substantial body of Missouri case law which treats pregnancy and illness as voluntary "on the basis of a single court's questionable construction of a federal statute." (App. at A12). Though four of the justices agreed to the result, there was obviously considerable disagreement in the rationale. The main opinion was fully endorsed by two justices. One other justice concurred without opinion. The fourth, Justice Robert T. Donnelly, wrote a separate concurring opinion which was slightly revised in the denial of the Motion for Rehearing.[5] A fifth justice, Charles B. Blackmar, filed a separate dissenting opinion in which the remaining two justices concurred. In his dissent, Justice Blackmar stated that by enacting 26 U.S.C. §3304(a)(12), Congress clearly intended to prohibit the disqualification of women in Mrs. Wimberly's situation. Additionally, Justice Blackmar maintained that pregnancy could not be construed as a voluntary act in order to deny benefits to otherwise eligible women. Mrs. Wimberly filed a Motion for Rehearing in the Missouri Supreme Court which was denied. (App. at A21).

5. Justice Donnelly's concurring opinion is indicative of the confusion and disagreement regarding the Missouri Supreme Court decision. The central thesis of Justice Donnelly's concurring opinion can be summarized in his words:

> [a]lthough we may be bound to follow the United States Supreme Court's decision concerning federal statutes as involving uniquely federal questions, *see* Urie v. Thompson, 337 U.S. 163, 174 (1949), in my view we are not so bound as to its pronouncements regarding the United States Constitution. (App. at A14).

This expression represents not only a rather unique view of the relationship between the federal and state courts, but it is also totally out of order in the *Wimberly* case which involves neither a United States Supreme Court decision nor a constitutional issue.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Directly Conflicts With the Decision of the United States Court of Appeals for the Fourth Circuit in Brown v. Porcher.[6]

The issue presented in this case is whether a state may deny unemployment compensation to a woman solely because she left her last job due to pregnancy and was denied reinstatement in that job when she was available for and able to work. The court below held that a state was permitted to do so if it treated women who left work because of pregnancy the same as persons who left work because of illness. The Fourth Circuit Court of Appeals has reached precisely the opposite conclusion in *Brown v. Porcher,* 660 F.2d 1001 (4th Cir. 1981).

Brown v. Porcher was a class action challenging the policies of the South Carolina Employment Security Commission which denied unemployment compensation to women who left their most recent job due to pregnancy. The District Court held that such a policy violated 26 U.S.C. §3304(a)(12). The defendants appealed to the Fourth Circuit Court of Appeals.

The Fourth Circuit found that the legislative history surrounding the enactment of 26 U.S.C. §3304(a)(12) and

6. 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983).

the language of the statute indicate that Congress intended to prohibit the denial of unemployment benefits to otherwise eligible women who leave their jobs due to pregnancy and are denied reinstatement. *Brown v. Porcher,* 660 F.2d 1001, 1004 (4th Cir. 1981). The Fourth Circuit concluded that under 26 U.S.C. §3304(a)(12), claimants in this situation must be treated differently than other claimants with other disabilities, and a woman who leaves her job due to pregnancy cannot be treated as having voluntarily quit her job.

The facts of the instant case are strikingly similar to the facts in *Brown v. Porcher.* The State of Missouri disqualified Mrs. Wimberly in precisely the same manner that Mrs. Brown was disqualified by the State of South Carolina in *Brown v. Porcher.*

The Missouri Supreme Court, however, disagreed with the Fourth Circuit interpretation of 26 U.S.C. §3304(a)(12). The court found that the language of the statute and the legislative history indicated that Congress intended a narrower interpretation of the statute to "proscribe state laws that denied compensation on the basis of pregnancy alone." (App. A10). The Missouri Supreme Court interpreted the federal statute as prohibiting the treatment of pregnancy differently from other disabilities. (App. A9-A11). Because the Missouri Revised Statute §288.050.1(1), (Supp. 1984), provides for the disqualification of anyone who voluntarily leaves work without good cause attributable to the work or the employer, the Missouri Supreme Court found that respondents, in treating pregnancy and illness the same, did not violate the federal statute. (App. A12-A13). Thus the Missouri Supreme Court treats the leaving of a job due to pregnancy as a voluntary act.

This significant conflict between the highest court of Missouri and the Fourth Circuit Court of Appeals has

not been and should be resolved by this Court. The resolution of this conflict is crucial to the orderly administration of the federal unemployment compensation program. The proper construction of 26 U.S.C. §3304(a)(12) must be determined in order to enable Missouri and other states to establish employment security policies that comply with the law. This issue is so significant that even before a conflict between a federal court of appeals and the highest court of a state existed, three justices of this Court, Justices White, Powell and Rehnquist, felt that certiorari should be granted to consider this issue. *Porcher v. Brown,* 459 U.S. 1150 (1983).

II

The Decision of the Missouri Supreme Court Promotes Confusion Among the States Regarding the Proper Interpretation of the Federal Statute, 26 U.S.C. §3304(a)(12).

At the time that the defendants in *Brown v. Porcher* sought review by this Court of the Fourth Circuit decision, the Solicitor General in an Amicus Curiae brief asserted that eight states and the District of Columbia denied benefits to claimants who left work because of pregnancy and health problems not attributable to their employment. These states included Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, South Carolina, West Virginia and Vermont.[7] According to the Solicitor General,

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7. Brief of Solicitor General for the United States as Amicus Curiae at 18, *Porcher v. Brown,* 459 U.S. 1150 (1983) (denial of certiorari) (Hereinafter cited as Amicus Curiae Brief). *Also see* Note, "Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act", 82 Mich.L.Rev. 1925, 1926-1927 (1984). (Hereinafter cited as "Note, Denial of Unemployment Benefits".) An analysis of the other states that do not disqualify women due to pregnancy can be found in Amicus Curiae Brief at 18-23.

the remaining forty-two states had policies that provided for unemployment compensation benefits in the event a woman left her job due to pregnancy and was denied reinstatement when she was able to work.[8] Petitioner's own independent survey[9] indicates that the state of Minnesota and North Dakota probably should have been included among the states that denied benefits to claimants who left work because of pregnancy.[10]

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8. Amicus Curiae Brief at 18-23. *Also see* Note, Denial of Unemployment Benefits at 1926-1927. Five of the states listed as not disqualifying women who leave their jobs due to pregnancy have "voluntarily quit" statutes that are similarly worded to that of Missouri which disqualify a claimant who voluntarily left his employment without good cause attributable to or connected to the work or employer. These states are Georgia, Louisiana, New Jersey, North Carolina and Wisconsin. Ga. Code §34-8-158(1) (1984); La. Rev. Stat. Ann. §23:1600(1) (West 1985); N.J. Rev. Stat. §43:21-5(a) (1985); N.C. Gen. Stat. §96-14 (1) (1983); and Wis. Stat. §108.04(7) (1985); *Also see* Amicus Curiae Brief at 18-23.

9. In an effort to update the conclusions of the Solicitor General, the citations listed by the Solicitor General for the policy of each state regarding pregnancy related separations were reviewed. Where it was believed that the Solicitor General's characterization of a state's policy may not have been entirely correct, and where the statutes and case law of a particular state did not provide the source for determining the policy of that state (since most states have no reported case law and very little administrative decisions on this issue), the legal counsel for that particular state department of employment security was telephoned. Final conclusions regarding the policies of those states were based on the comments of the legal counsel concerning the state's policy regarding pregnancy related separations in general and the fact situation of the instant case in particular.

10. This survey also indicates that Oklahoma should not have been included among the states that denied benefits to claimants who left work because of pregnancy. In Oklahoma, a woman who must leave her job because of pregnancy can receive unemployment benefits when she is denied reinstatement if she (1) asked for a leave of absence; (2) obtained a medical statement reflecting that due to health reasons she should cease work on a certain date; and (3) upon termination of pregnancy and when her health and ability to work are restored, she reapplies for work with her employer pursuant to the employer's specifications. *Hackler v. Halliburton Oil Well Cementing Co.*,

(Continued on following page)

Since the *Brown v. Porcher* decision, some of the states that were listed in the Amicus Curiae Brief as having a policy that disqualified claimants who left their job due to pregnancy have changed their policies. These states include New Mexico, Louisiana, West Virginia, Nebraska and South Carolina (the state involved in *Brown v. Porcher*).

New Mexico changed its policy by amending its statute to prohibit the denial of unemployment benefits solely on the basis of pregnancy. N.M. Stat. Ann. §51-1-7(A) (1983 Rep.Vol.). However, people who leave their jobs due to illness unrelated to pregnancy are still disqualified from receiving benefits. *B. & H. Company, Inc. v. Moss*, 89 N.M. 549, 555 P.2d 372 (1976); *Ribera v. Employment Security Comm.*, 92 N.M. 694, 594 P.2d 742 (1979).

In Louisiana, the policy concerning pregnancy related separations from employment changed[11] after *Brown v. Porcher* through case law associated with separations from employment due to health problems. Currently, a claimant who leaves his employment because of a health problem will not be disqualified from receiving benefits since

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Footnote continued—

Administrative Dec. No. 189-BR-59 (1959); *Mitchell v. John Doe Abstract Co.*, Administrative Dec. No. 1050-BR-77 (1977). If the employer has a policy which does not allow pregnancy leave and the employee, despite this, requests a pregnancy leave and requests that she be allowed to return to work, she has made an effort to preserve the employer-employee relationship and she would be qualified for benefits if not reinstated. *Edwards v. Halliburton Oil Well Cementing Co.*, Dist. Ct. Stephens Co. Case No. 18693 (1961).

11. It should be noted that despite the assertion in the Amicus Curiae Brief that Louisiana disqualified women who left their jobs due to pregnancy, prior to the enactment of 26 U.S.C. §3304(a)(12) and *Brown v. Porcher*, there was case law authority in Louisiana for the award of benefits to a woman separated from her employment due to pregnancy. *See Southern Bell Telephone & Telegraph Co. v. Administrative Division of Employment Security of the Dept. of Labor*, 252 La. 519, 211 So.2d 634 (1968).

illness is not considered a voluntary condition. *Craighead v. Administrator Dept. of Employment Security of the State of Louisiana,* 420 So.2d 688 (La.App. 1982).

After the *Brown v. Porcher* decision, West Virginia amended its "voluntary quit" statute to delete references to pregnancy related disqualifications. W.Va. Code §21A-6-3(1) (Rep. 1983).

In a recent Nebraska administrative decision it was determined that a woman who left her job due to pregnancy was eligible for unemployment benefits when she intended to return to work and attempted to preserve her employment but was denied reinstatement. *Belva J. Godfrey,* Nebraska Appeal Tribunal Decision No. 84-2543 (1984).

Currently, Vermont, Minnesota, North Dakota and Washington, D.C. still have policies like Missouri's that impose some type of disqualification for benefits upon a woman who leaves her job due to pregnancy. In Vermont, a person who leaves work for health reasons (including pregnancy) will be disqualified for a period of one to six weeks. The length of time for the disqualification is determined at the discretion of the employment security commissioner. Vt. Stat. Ann. tit. 21 §1344(a)(3) (Supp. 1984).

In Minnesota, a woman who leaves her job due to a normal pregnancy and is denied a leave of absence or denied reinstatement after obtaining a non-guaranteed leave of absence is treated as having voluntarily quit her job without good cause attributable to her employer. *See* Minn. Stat. §268.09.1(2)(b) (1984).[12] However, if a

12. Although there are no reported or unreported cases or administrative decisions on the treatment of a pregnancy re-

(Continued on following page)

woman develops serious medical problems during her pregnancy and must leave her job as a result, she will not be disqualified provided she makes reasonable efforts to retain her employment. *See* Minn. Stat. §268.09.1(2)(b) (1984).

North Dakota disqualifies a woman who leaves her job due to pregnancy and is later denied reinstatement because the woman is determined to have voluntarily quit her job without good cause attributable to her employer. *See* N.D. Cent. Code §52-06-02.1 (Supp. 1983). Despite this disqualification of women due to pregnancy related separations, North Dakota will not disqualify a claimant who left his job due to illness if the claimant notified the employer that a physician ordered him to quit work and if the claimant (within sixty days of his last work day) offered to return to work when he was able to do so. N.D. Cent. Code §52-06-02.1 (Supp. 1983).[13]

Washington, D.C. amended its regulations in 1983 to provide the following:

> When an individual is temporarily separated from employment by reason of pregnancy and is unemployed

Footnote continued—

lated separation from work, according to John Van Steenwyk, Chief Adjudicator of the Minnesota Department of Economic Security, in a July 1, 1985, telephone conversation, a woman who leaves her job due to pregnancy will be disqualified whether or not she attempts to preserve her job unless serious complications have arisen in her pregnancy to constitute a serious illness under the statute. Mr. Steenwyk indicated that while these policies are unwritten, he is in the process of drafting a written manual containing these policies to be published in September, 1985.

13. There are no reported or unreported cases or administrative decisions on this issue. Additionally, there is no written manual, handbook or policy statement concerning this issue. The proposition that pregnancy is not treated as an illness in North Dakota was based on a telephone conversation on July 2, 1985, with William G. Peterson, Attorney with the Legal Department of Unemployment Compensation Commission of North Dakota.

within the meaning of the Act, able, available and actively seeking work, such individual *may* be entitled to benefits. A determination shall be made as to the separation issue but claimant shall not be automatically subject to disqualification for voluntarily quitting under Section 10(a) of the Act [D.C. Code 1981, Sec. 46-111(a)].

A voluntary quit because of pregnancy shall be treatd like any other voluntary quit because of a physical condition or disability. The claims examiner shall inquire into the claimant's availability and availability for suitable work and make a determination regarding eligibility for benefits in accordance with the Act and this Chapter.

Regulation 4612.10, 31 D.C. Reg. 3156 (1983) and Regulation 4612.11, 31 D.C. Reg. 3156 (1983).

Because Washington, D.C. treats claimants who left their jobs due to pregnancy or illness the same,[14] Regulation 4612.7(3), 28 D.C. Reg. 4977 (1981) would apply to pregnancy related claims for benefits. That regulation requires a claimant to provide the employer with a medical statement indicating that the claimant's condition is *aggravated* by the work. Therefore, a claimant who leaves her job in order to have a child and is denied reinstatement in her job may be disqualified from receiving unemployment compensation benefits in Washington, D.C. if she could not assert that her medical condition was aggravated by the work.

There is only one reported decision in Washington, D.C. concerning a claimant who left her job due to pregnancy. *Brooks v. District of Columbia Dept. of Employment Servs.*, 453 A.2d 812 (App.D.C. 1982) (per curiam). In *Brooks*, the claimant never attempted to obtain a pregnancy leave nor did she attempt to become reinstated after her pregnancy was terminated.

14. Regulation 4612.11, 31 D.C. Reg. 3156 (1983).

It is difficult to determine how many of the states that have policies that conform to *Brown v. Porcher* implemented those policies because they believed that federal law mandated such policies. Nevertheless, it is apparent that substantial confusion exists among the states regarding the administration of unemployment compensation and pregnancy related separations. The confusion that exists over the proper interpretation of 26 U.S.C. §3304(a)(12) "makes it difficult for conscientious administrators of unemployment compensation programs to determine what is required of them by the Federal Government." *Porcher v. Brown*, 459 U.S. 1150, 1152 (1983) (Dissenting opinion of Justices White, Powell and Rehnquist). This issue affects every state. Each state requires guidance from this Court as to the proper interpretation of the federal statute in question. Each state must know whether its policies are causing the improper denial of unemployment benefits to eligible claimants or whether benefits are being paid to claimants who are not truly eligible under the law. Because of the importance of the issue, a uniform interpretation and construction of 26 U.S.C. §3304(a)(12) by this Court is necessary in order to direct the states in their policies affecting women and pregnancy related separations from employment.

III

The Decision Below Conflicts With the United States Court of Appeals for the Fourth Circuit on an Issue That Significantly Affects the Orderly Administration of the Federal Unemployment Compensation Program.

The question presented in this case is whether a state violates 26 U.S.C. §3304(a)(12) by denying unemployment compensation benefits to otherwise eligible women who leave their jobs due to pregnancy and are denied reinstatement. The resolution of this question is crucial to the orderly administration of the federal unemployment compensation program because it is a frequent question that faces each state and affects the lives of a substantial portion of the population.

There are approximately twenty-one million women in the United States between the ages of eighteen and thirty-four who are in the civilian labor force.[15] During their working lives, approximately eighty-five percent of women in this age group are likely to give birth at least once.[16] The provision of a source of income is critical for women who wish to return to work and are faced with the unavailability of their previous employment.

Women who have withdrawn from the job market in order to have a child can only remain "effective participants

15. Note, Denial of Unemployment Benefits at 1925, citing U.S. Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-20 No. 363, Population Profile of the United States: 1980 at 33 (1981) and U.S. Bureau of the Census, U.S. Department of Commerce, Current Population Reports: Consumer Income, Series P-60 No. 132, Money Income of Households, Families and Persons in the United States: 1980 at 225 (1982).

16. Note, Denial of Unemployment Benefits at 1925, citing U.S. Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-20-22 No. 325, Fertility of American Women: June, 1977 (1978).

in the economy" if assistance is "provided to encourage their return to work when they are physically able to do so."[17] Without some assistance, "many women would be hampered in their effort to rejoin the work force. Absent, for example, some income to pay for child care expenses while looking for work, a woman cannot effectively compete in the employment process with others."[18] A woman who returns to the job market after giving birth to a child "can suffer real economic hardship if the employer does not re-hire her and she cannot collect unemployment compensation."[19] A woman who is denied reinstatement not only suffers the economic burden of supporting herself while seeking new employment, but she must also support her new child. This lack of financial support, during the time in which a new mother is attempting to find work, can create a very serious and significant problem for a changing society such as ours in which pregnant workers and working mothers have become the norm rather than the oddity. Studies indicate not only that more women are part of the work force,[20] but also that these women either contribute substantially to the family income or are the sole source of it.[21]

In each case in which a formerly pregnant woman has filed a claim for unemployment benefits after she

17. *Brown v. Porcher*, 502 F.Supp. 946, 956 (1980).

18. *Id.*

19. *Id.* at 955.

20. "During the 1970's women represented 60% of the growth in the labor force. The participation rate of women in the labor force climbed from 43% in 1970 to 51% in 1980. Note, Denial of Unemployment Benefits at 1953, citing U.S. Bureau of the Census, U.S. Department of Commerce, Current Population Reports: Consumer Income, Series P-60 No. 132, Money Income of Households, Families and Persons in the United States: 1980 at 3 (1982).

21. Note, Denial of Unemployment Benefits at 1953, citing S. Kamerman, Maternity and Parental Benefits and Leaves 8 (Impact on Policy Series Monograph No. 1, 1980).

has been denied reinstatement in her job, a decision must be made by the state in which she lives whether to grant or deny her benefits. The state must be assured that its decision complies with the law. The woman must be assured that the grant or denial of her benefits was proper. Accordingly, the construction of 26 U.S.C. §3304 (a)(12) and the question of whether a woman in Mrs. Wimberly's situation can be eligible for unemployment benefits is a critical question facing each state and many women. This question has not been and should be decided by this Court. This Court's interpretation of 26 U.S.C. §3304(a)(12) will have a significant impact on each state and on working women of child-bearing ages. It will finally resolve the confusion among the states in determining whether they may deny benefits to otherwise eligible women who have left their jobs due to pregnancy and are denied reinstatement. It will also enable working women to plan their families and adjust their lives in accordance with appropriate expectations regarding unemployment benefits.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Missouri Supreme Court.

Respectfully submitted,

JULIE E. LEVIN (*Counsel of Record*)
Legal Aid of Western Missouri
1103 Grand, Fourth Floor
Kansas City, Missouri 64106
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Attorney for Petitioner

APPENDIX A

(Filed April 2, 1985)

SUPREME COURT OF MISSOURI
EN BANC

LINDA WIMBERLY,	)	
Respondent,	)	
v.	)	No. 66083
THE LABOR AND INDUSTRIAL	)	
RELATIONS COMMISSION	)	
OF MISSOURI	)	
and	)	
THE DIVISION OF	)	
EMPLOYMENT SECURITY	)	
OF THE STATE OF MISSOURI,	)	
and	)	
J.C. PENNEY CO., INC.,	)	
Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY

Honorable Timothy D. O'Leary, Judge

Respondent initiated this proceeding in the Circuit Court of Jackson County after the Missouri Labor and Industrial Relations Commission denied her claim for unemployment compensation. The circuit court reversed and the Missouri Court of Appeals, Western District, affirmed the circuit court's judgment. We ordered the cause transferred to determine whether 26 U.S.C. § 3304(a)(12) (1982) of the Federal Unemployment Tax Act requires states, as a predicate to receipt of federal assistance, to provide unemployment benefits to otherwise eligible claimants who left their employment due to pregnancy. We reverse.

[2]* The parties accept the Commission's findings of fact. Respondent had been employed by the J.C. Penney Company, Inc., as a cashier and sales clerk for approximately three years. In late August 1980, respondent, then approximately seven months pregnant, requested a leave of absence, citing her pregnancy as the reason. In accordance with its established policy, the employer granted respondent a "leave" without a guarantee of reinstatement, i.e., respondent would be rehired only if a position was available. Respondent's child was born on November 5, 1980. When, on December 1, 1980, respondent notified the employer of her desire to return to work, she was informed that there were no positions open.

Respondent filed a claim for unemployment compensation benefits on December 7, 1980. A deputy for the Division of Employment Security denied the claim on the ground that respondent was disqualified under § 288.050.1 (1), RSMo 1978. The deputy determined that respondent "quit because of pregnancy" and, therefore, had left work voluntarily without good cause attributable to her work or her employer. Respondent appealed the decision to the Division's Appeals Tribunal. After a full evidentiary hearing at which respondent appeared with counsel, the Appeals Tribunal issued findings of fact and conclusions of law and affirmed the deputy's decision. The Tribunal concluded:

> Although the claimant did have a good reason for leaving her employment, it is found that that reason was in no way attributable to her work or to her employer. Accordingly, it is found that the claimant quit her job voluntarily on August 23, 1980, without good cause attributable to her work or to her employer.

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*Note: Numbers in brackets represent original page numbers at time of filing.

The Industrial and Labor and Industrial Relations Commission denied respondent's petition for review, and thereby adopted the Tribunal's findings and conclusions. § 288.201.1, RSMo 1978. Respondent then filed [3] a petition for review in the circuit court and that court reversed the Commission's decision. The court accepted the agency's findings of fact and acknowledged that Missouri courts had construed § 288.050.1(1) to disallow unemployment compensation benefits when the claimant left work on a maternity leave without a guarantee of reemployment at the end of the leave period. It concluded, however, that the existing law in Missouri was contrary to 26 U.S.C. § 3304(a)(12) (1982), as construed in Brown v. Porcher, 660 F.2d 1001 (4th Cir. 1981), *cert. denied,* 459 U.S. 1150 (1983). Section 3304(a)(12), one of the federal minimum standards with which states must comply if their unemployment insurance scheme is to qualify for federal assistance, provides that "no person shall be denied compensation under [a state unemployment compensation] law solely on the basis of pregnancy or termination of pregnancy." Relying on *Brown v. Porcher,* the circuit court held that § 3304(a)(12) "banned the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women," and accordingly, the court reversed the Commission's decision and remanded for entry of an award.

The Western District affirmed the court's judgment. Though the court expressed "reservations concerning the soundness of the ruling in *Brown,*" slip op. at 14, it felt constrained to follow the Fourth Circuit's interpretation of § 3304(a)(12), stating:

> In cases dealing with the construction of federal statutes, this court is bound by and must follow decisions of federal courts. Buffalo v. Bull, 619 S.W.2d 913, 919 (Mo. App. 1981), citing Haley v. Metropolitan Life

> Insurance Company, 434 S.W.2d 7, 11 (Mo. App. 1968). From this rule, it follows that this court must affirm, due to the ruling in *Brown v. Porcher,* the judgment of the circuit court herein.

Slip op. at 13.

I.

[4] The legislature enacted the Missouri Employment Security Law to provide a partial wage replacement for workers left unemployed through no fault of their own. O'Dell v. Division of Employment Security, 376 S.W.2d 137 (Mo. 1964). A claimant must satisfy two general requirements to qualify for unemployment benefits. First, he or she must be "able to work and available for work." § 288.040.1(2), RSMo Supp. 1984. Second, the claimant must be free from disqualification. Section 288.050.1(1) disqualifies a claimant if he "left his work voluntarily without good cause attributable to his work or to his employer."[1] Missouri courts have interpreted this provision to disqualify claimants who quit[2] their job on account of pregnancy or personal illness unrelated to the employment. *See* Fifer v. Missouri Division of Employment Security, 665 S.W.2d 81 (Mo. App. 1984); Duffy v. Labor and Industrial Relations Commission, 556 S.W.2d 195 (Mo. App. 1977); Bussmann Manufacturing Co. v. Industrial Commission, 335 S.W.2d 456 (Mo. App. 1960); Bussmann Manufacturing Co. v. Industrial Commission, 327 S.W.2d 487

1. Under § 288.050.1, a claimant found to be disqualified is not entitled to benefits "until after he has earned wages equal to ten times his weekly benefit amount."

2. A leave of absence without a guarantee of reinstatement has been treated as a "quit" when the employer refuses to rehire the employee at the termination of the leave. *See* Fifer v. Missouri Division of Employment Security, 665 S.W.2d 81 (Mo. App. 1984); Division of Employment Security v. Labor and Industrial Relations Commission, 617 S.W.2d 620 (Mo. App. 1981). *Compare* Trial [sic] v. Industrial Commission, 540 S.W.2d 179 (Mo. App. 1976).

(Mo. App. 1959). *See also* Division of Employment Security v. Labor and Industrial Relations Commission, 617 S.W.2d 620 (Mo. App. 1981); Neeley v. Industrial Commission, 379 S.W.2d 201 (Mo. App. 1964); LaPlante v. Industrial Commission, 367 S.W.2d 24 (Mo. App. 1963). These decisions persuasively demonstrate that the [5] wording of § 288.050.1(1) evidences a manifest legislative desire to disqualify claimants who, like respondent left work for reasons that, while perhaps legitimate and necessary from a personal standpoint, were not causally connected to the claimant's work or employer.

The question before us in this proceeding is whether the state can deny unemployment benefits to otherwise eligible claimants who left their employment due to pregnancy and still qualify for certain forms of federal assistance. Understanding this question requires a brief description of this nation's system of unemployment compensation. The system operates as a cooperative venture between the federal government and the various states. The Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 et seq. (1982), imposes a federal payroll tax on wages paid by covered employers. The Act, however, authorizes a credit against a substantial part of the federal tax liability to employers who contribute to a state unemployment compensation fund approved by the Secretary of Labor. Federally-approved state programs also are entitled to federal grants to cover the cost of administering the program.

Section 3304(a) directs the Secretary to approve a state's program if he finds that it complies with the "fundamental standards" enumerated therein. Compliance with the standards is voluntary but all of the states have found the lure of tax credits and grants in return for conforming legislation "an offer that could not be refused." State of

New Hampshire Department of Employment Security v. Marshall 616 F.2d 240, 241 (1st Cir.), *appeal dismissed* and *cert. denied*, 499 U.S. 806 (1980). Indeed, it is the expressly stated policy of the Missouri Employment Security Law to comply with the federal minimum standards:

> If the Federal Unemployment Tax Act, the Federal Social Security Act or other related federal [6] laws are amended to provide minimum standards for the payment of unemployment benefits, such standards shall become a part of this law to the extent necessary to entitle employers subject to this law to claim the maximum allowable credit against the federal unemployment tax. The provisions of this section shall be implemented by regulation by the division.

§ 288.390, RSMo 1978. Respondent contends such an amendment occurred in 1976 when Congress added a new federal minimum standard providing that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy." § 3304(a)(12). The issue to be decided is whether § 3304(a)(12) alters the previously existing law to such a degree that, under § 288.390, we must reject the case law construing § 288.050.1(1) which mandates denying unemployment benefits to claimants in respondent's situation.

II

The decision in *Brown v. Porcher*, the only reported case construing § 3304(a)(12), quite properly figured prominently in the opinions rendered by the circuit court and the Western District. Certain views expressed by the latter court warrant clarification, however. The Western District stated that the courts of this state, when confronted with the task of interpreting a federal statute,

are bound to follow the decisions of lower federal courts construing the statute in question. While several decisions of the court of appeals contain similar statements, *see e.g.*, Buffalo v. Bull, 619 S.W.2d 913, 919 (Mo. App. 1981); Haley v. Metropolitan Life Insurance Co., 434 S.W. 2d 7, 11 (Mo. App. 1968); State ex rel. Atkins v. Missouri State Board of Accountancy, 351 S.W.2d 483, 485 (Mo. App. 1961); McElvain v. St. Louis & San Francisco Railroad, 151 Mo.App. 126, 131 S.W. 736, 743 (1910), this Court has never subscribed to such a notion. On the [7] contrary, we have adhered to the view that the courts of this state are bound to follow only our Supreme Court's decisions interpreting the federal Constitution and federal statutes. *See, e.g.*, S.S. & W., Inc. v. Kansas City, 515 S.W. 2d 487 (Mo. 1974); State v. Moreland, 351 S.W.2d 33 (Mo. 1961); Wehrli v. Wabash Railroad Co., 315 S.W.2d 765 (Mo. 1958) (interpreting the Federal Employers' Liability Act); Meek v. New York, Chicago & St. Louis Railroad Co., 88 S.W.2d 333 (Mo. banc 1935) (interpreting the Federal Safety Appliance Act); Hardin v. Illinois Central Railroad Co., 70 S.W.2d 1075 (Mo. 1934) (interpreting the Federal Boiler Inspection Act). Although loose language in some opinions indicates that state courts are "bound" by a "federal court's" interpretation of a federal statute, we have discovered no instance in which this Court declined to interpret a federal statute in a particular fashion out of a concern that to do so would run afoul of a lower federal court interpretation of the statute.

We do not mean to suggest that a lower federal court's construction of a federal statute is wholly irrelevant. The courts of this state should "look respectfully to such opinions for such aid and guidance as may be found therein." Hanch v. K.F.C. National Management Co., 615 S.W. [sic] 28, 33 (Mo. banc 1981). In some circumstances it

may be appropriate for a state court to defer to long established and widely accepted federal court interpretations of federal statutes. But a state court should not hesitate to undertake its own independent assessment of the propriety of a single lower federal court's attempt to construe a statute when the court perceives well-founded deficiencies in that court's analysis.

[8] III

The decisions below presume that § 3304(a)(12) has the effect of proscribing this state's long-established practice of disqualifying claimants who leave their employment for reasons attributable to pregnancy. In reaching this conclusion, each court relied heavily on the interpretation of § 3304(a)(12) rendered in *Brown v. Porcher*. The question now facing this Court is whether the text of the statute and its legislative history supports *Brown's* interpretation of § 3304(a)(12).

In *Brown*, a group of claimants who had been denied unemployment compensation in South Carolina brought suit in federal court claiming that South Carolina's policy of denying compensation to women who left their prior employment on account of pregnancy violated § 3304(a)(12).[3] The district court agreed, holding that the statute "imposed a sweeping ban on the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women." 502 F.Supp. 946, 955 (D.S.C. 1980). Both the district court and the U.S. Court of Appeals for the Fourth Circuit, which affirmed the decision on appeal,

3. A South Carolina statute disqualified a worker if he had "left voluntarily without good cause his most recent work," S.C. Code Ann. § 41-35-120(1)(1976), and the South Carolina Employment Security Commission, like its Missouri counterpart, interpreted the statute to disqualify eligible claimants who left their most recent work for pregnancy-related reasons.

found the statute "unambiguous" and purported to interpet the plain meaning of the statutory language. Neither court was moved by the argument that the Department of Labor interpreted the statute only to prohibit laws that created a special category for pregnancy-related claims and which denied the claims on the basis of pregnancy alone.[4] The district court noted:

> [9] If Congress intended a more limited prohibition or carved out exceptions, it would not have . . . use[d] such broad and sweeping language. It would have relied upon more specific language and used appropriately restrictive expressions . . . [Section 3304(a)(12)] does not permit denial of benefits . . . solely because (1) a woman, for pregnancy-related, medical reasons, voluntarily left work to have a child rather than wait for her employer to fire her, (2) a woman was refused a maternity leave or her leave had no fixed terminal date, or (3) a woman attempted to return to her job either before or after her maternity leave was scheduled to expire. The plain and un-

4. The Department of Labor's interpretation of § 3304(a)(12) was clearly set forth in a publication distributed to the states following enactment of § 3304(a)(12):

> The new provision requires that the entitlement to benefits of pregnant claimants be determined on the same basis and under the same provisions applicable to all other claimants. It does not mean that pregnant claimants are entitled to benefits without meeting the requirements of the law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether she meets the statute's conditions for receipt of benefits.

U.S. Department of Labor, Employment and Training Administration, Unemployment Insurance Service, "Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—Public Law 94-566" at 62 (undated). Using this interpretation, the Department of Labor had certified the South Carolina unemployment program as complying with the federal minimum requirements.

ambiguous words of the enactment do not contemplate consideration of such irrelevant factors.

Id. at 955 (citation and footnotes omitted).

The United States Supreme Court denied certiorari, but Justice White, joined by two other justices, dissented. Justice White expressed misgivings about the lower court's interpretation of § 3304(a)(12):

> It is by no means clear, however, that § 3304(a)(12) does not simply provide that pregnancy must be treated like all other disabilities—that pregnancy simply cannot be singled out for unfavorable treatment. The Department of Labor adheres to such an interpretation and thus disagrees with the Fourth Circuit's interpretation of § 3304(a)(12).

[10] 459 U.S. at .....; 103 S.Ct. at 797 (1983).

We share Justice White's doubts regarding the efficacy of *Brown's* interpretation of § 3304(a)(12). First, the court in *Brown* ignored Congress' use of the qualifying phrase ". . . *solely* on the basis of pregnancy . . ." (emphasis added). Use of the word "solely" indicates that Congress intended to proscribe state laws that denied compensation on the basis of the pregnancy alone. Neither the Missouri statute nor the South Carolina statute challenged in *Brown* make an express reference to pregnancy: in each case compensation was denied because the claimants had left work for reasons that were not attributable to the employer or connected with the work. If Congress had intended to bar disqualification on any ground in cases involving pregnancy, as *Brown* holds, it could have unambiguously expressed its intent without using the word "solely." We are inclined to give greater weight to the Department of Labor's interpretation because it gives effect to every word in the statute.

Second, our examination of the legislative history reveals that Congress deleted language from an earlier draft of § 3304(a)(12) which would expressly have authorized the result reached in *Brown*. As originally proposed by a bill introduced in 1975, § 3304(a)(12) provided:

> No person shall be denied compensation solely on the basis of pregnancy and *determinations under any provision of such State law relating to voluntary termination of employment,* availability for work, active search for work, or refusal to accept work shall not be made in a manner which discriminates on the basis of pregnancy.

S. 2079, 94th Cong., 1st Sess. § 8(a)(1975); H.R. 8366, 94th Cong., 1st Sess. § 8(a)(1975) (emphasis added), *quoted in* Note, "Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act," 82 [11] Mich.L.Rev. 1925, 1942 (1984). The broad language in the second clause clearly would have required states like Missouri and South Carolina to terminate their practice of disqualifying claimants who left work on account of pregnancy. For reasons that are not revealed in the recorded history, this language was dropped during the pendency of the bill. We believe this act provides persuasive evidence that Congress consciously chose not to create the "sweeping ban" attributed to § 3304(a)(12) by *Brown*. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting).

Finally, we think this is an appropriate instance in which to defer to the interpretation rendered by the agency

Congress entrusted with administration of the statute. The Department of Labor's construction of § 3304(a)(12) comes closer to the plain meaning of the statutory language and is consistent with the legislative history. It is also worthy of note that the Secretary of Labor has continued to certify Missouri's unemployment program during the three and a half years since *Brown* was decided. We believe that it would be incongruous for this Court to inform the Secretary that he had erroneously certified Missouri's eligibility for federal assistance. The Supreme Court's recent decision in Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc, ... U.S. ....., 81 L.Ed.2d 694 (1984), speaks well to the dispute presented to us in this case:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within [12] a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." TVA v Hill, 437 US 153, 195, 57 LEd2d 117, 98 S Ct 2279 (1978).

Id. at ....., 81 L.Ed.2d at 717. This is no less applicable to state courts.

We are not inclined to disavow the substantial body of case law construing § 288.050.1(1) to disqualify claimants like respondent on the basis of a single court's questionable construction of a federal statute. It is for the General Assembly or Congress—and not the courts—to

decide whether there are, or are not, sound public policy reasons for granting unemployment compensation to women who leave work on account of pregnancy. In the absence of an unequivocal expression of intent by either of those bodies, we shall abide by the existing law.

The judgment is reversed.

.....

Warren D. Welliver,
Judge

Higgins, J. concurs; Rendlen, C.J. concurs in result; Donnelly, J., concurs in result in separate opinion filed; Blackmar, J., dissents in separate opinion filed; Billings and Gunn, JJ., dissent and concur in separate dissenting opinion of Blackmar, J.

(Filed April 2, 1985)

SUPREME COURT OF MISSOURI
EN BANC

LINDA WIMBERLY,	)	
Respondent,	)	
v.	)	No. 66083
THE LABOR AND INDUSTRIAL	)	
RELATIONS COMMISSION	)	
OF MISSOURI,	)	
and	)	
THE DIVISION OF EMPLOYMENT	)	
SECURITY OF THE STATE	)	
OF MISSOURI,	)	
and	)	
J. C. PENNEY CO., INC.,	)	
Appellants.	)	

OPINION CONCURRING IN RESULT

Although we may be bound to follow the United States Supreme Court's decisions concerning federal statutes as involving uniquely federal questions, *see* Urie v. Thompson, 337 U.S. 163, 174 (1949), in my view we are not so bound as to its pronouncements regarding the United States Constitution.

This is contrary to the views I expressed in 1972 and 1973. *See* Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. banc 1972), and Kraus v. Board of Education of City of Jennings, 492 S.W.2d 783, 784 (Mo. 1973). There I mistakenly assumed the propriety of the assertion in Cooper v. Aaron, 358 U.S. 1 (1958), that the United States Supreme Court's interpretations of the written Constitution constitute the "supreme law of the land" under Article VI

of the Constitution and are of binding effect on the states. I have since concluded that the *Cooper* assertion is an arrogation.

I concur only in the result.

.....
Robert T. Donnelly, Judge

(Filed April 2, 1985)

SUPREME COURT OF MISSOURI
EN BANC

LINDA WIMBERLY,	)	
Respondent,	)	
vs.	)	No. 66083
THE LABOR AND INDUSTRIAL	)	
RELATIONS COMMISSION	)	
OF MISSOURI,	)	
et al.,	)	
Appellants.	)	

DISSENTING OPINION

The principal opinion correctly expounds the purpose of the federal and state unemployment compensation programs in providing a partial wage replacement for workers left unemployed through no fault of their own. The statute denies eligibility to those who voluntarily quit and those who are discharged for misconduct. I believe that Congress, in the 1976 amendments to the Federal Unemployment Tax Act, had the purpose of extending benefits to a woman who becomes pregnant, leaves work as the anticipated delivery date appears, and then offers herself for work as soon after giving birth as she is able.

I.

26 U.S.C. § 3304(a)(12), as enacted in 1982, provides as follows:

> [2] No person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy.

It is of course assumed that Congress had some purpose in mind in enacting or amending a statute. I cannot see what Congress could have intended in enacting the provision just quoted if it did not intend to guarantee compensation to persons in the position of this claimant. The statute seems as clear to me as it did to the federal court in South Carolina and the United States Court of Appeals for the Fourth Circuit in Brown v. Porcher, 502 F.Supp. 946 (D.C.S.C. 1980), affirmed 660 F.2d 1001 (4th Cir. 1981), *cert. denied* 459 U.S. 1150 (1983), the only reported case on the point.

It is sometimes suggested that the statutory amendment had no purpose beyond that of eliminating state statutory requirements such as the Utah provisions dealt with in Turner v. Department of Employment Security, 423 U.S. 44 (1975), which established a conclusive presumption that a woman was unavailable for work for a certain time before and after childbirth. This argument is unconvincing. *Turner* ruled in favor of the claimant on the basis of the federal statute, and so there was no imperative need for legislation. The statutory language furthermore, is very broad.

I agree that we are not bound by the decision of a United States Court of Appeals, whether our own Eighth Circuit or another, on a federal question. Those courts, just as ours, are immediately subordinate to the Supreme Court of the United States. We have the authority and

the duty to read the law for ourselves, and decisions of coordinate courts do not control us. Decisions [3] of other jurisdictions, however, are helpful and, in this instance, highly persuasive.

The Supreme Court denied certiorari in *Brown v. Porcher, supra.* I am fully mindful of the frequent cautions against reading too much into a denial of certiorari. In this instance, however, the denial is highly persuasive. The case, however, involved a recent statute of national application and a fact situation which constantly recurs. I believe that the Supreme Court would have accepted review if a majority of the justices were of the view that *Brown v. Porcher* was unsound. The presence of the dissenting opinion, rare in denials of certiorari, actually lends force to the denial. Justice White's views, perhaps tentatively stated, simply did not commend themselves to a majority of the Court.

The principal opinion cites the position of the Department of Labor, and the failure to take any action to "disqualify" Missouri's program, in support of its conclusion. I disagree emphatically. Courts, not bureaucrats, give authoritative interpretation of statutes.[1] The statute before us is essentially simple, straightforward, and designed to enunciate a national policy. There may be occasion for deferring to an administrative interpretation if a statute is complicated or if technical knowledge is required, but this is not an appropriate case for deferral.[2] Nor is bu-

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1. FTC v. Colgate-Palmolive, 380 U.S. 374 (1965); Staley v. Missouri Director of Revenue, 623 S.W.2d 246 (Mo. banc 1981).

2. The Labor Department has not always been of the same view. In 1976 a Labor Department official wrote as follows:

> . . . In our view, a determination disqualifying an individual from benefits when it is found that "her total or partial unemployment is due to pregnancy" . . . is as discriminatory

(Continued on following page)

reaucratic inertia a proper circumstance in [4] support of a holding. It may be assumed that the administrators would wait until a question in a pending case is resolved judicially.

Besides, I do not find the Department of Labor's interpretation dispositive of the point at issue. When Justice White's position is adduced, it must be noted that his views are those of a minority. He simply argued in favor of granting review, and pointed to other important issues not involved in this case.

The principal opinion cites legislative history in an attempt to shore up its position. If the statute is clear on its face there is no occasion to refer to legislative history. The language quoted in the principal opinion is from a 1975 bill. A responsible legislature might have felt that the quoted language was prolix and unnecessary, and that, if too many details were covered, omissions might be construed adversely to claimants. The initial bill was modified in the House of Representatives, in [5] which it originated, and so the Senate was not privy to the initial language. There is nothing whatsoever to indicate that Congress intended to deny compensation in the situation presented by this record. It is best to start with the clear language of the statute.

The word "solely" means to the exclusion of all else. As used in the statute, it means that pregnancy cannot

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Footnote continued—

as the Utah provision . . . which the Court specifically struck down. Such a provision may mean only that the individual's work separation, *whether a quit or a discharge,* was because she was pregnant. A disqualification on the basis of such a provision would not be based on an individualized determination as to whether or not the individual was able to work, but only on the fact that her unemployment was due to pregnancy. CCH *Unemploy. Ins. Rep.* ¶21,842 (1976), U.S. Department of Labor, *Unemployment Insurance Program Letter* No. 1-76. (Emphasis added).

be used as a factor in the determination of an award. The Commission automatically classifies a pregnant woman as having voluntarily quit her job when she leaves for confinement and delivery. Pregnancy is, thus, the primary determinant in the denial of benefits. This conflicts with the purpose of the federal statute, regardless of whether state statute law specifically discriminates because of pregnancy. The application of the state statute, not its constitutionality, is being challenged.

II.

The opinion of the St. Louis Court of Appeals in Bussmann Manufacturing Co. [sic] Industrial Commission, 335 S.W.2d 456 (Mo. App. 1960) holding that a woman who leaves work to give birth leaves her work "voluntarily without good cause attributable to [her] work or to [her] employer," and cases following it should be disapproved.[3] It is a perversion of language to say that pregnancy is "voluntary." It is, rather, something which sometimes happens to susceptible women who engage in the necessary preliminaries.

[6] In contrast to the Court of Appeals in *Bussmann,* I believe that disqualification ensues only if the termination of employment is (1) voluntary, and (2) not related to employment. An employee who tenders a permanent resignation of course leaves work voluntarily, but may still receive unemployment compensation if conditions of employment make continued working impossible.[4] It follows that an employee who does not leave voluntarily is not

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3. Other pregnancy cases are Neely v. Industrial Comm. of Missouri, 379 S.W.2d 201 (Mo. App. 1964), Davis v. Labor & Industrial Relations Committee, 554 S.W.2d 541 (Mo. App. 1977).

4. *See* City of Florissant v. Labor & Industrial Relations Committee, 613 S.W.2d 713 (Mo. App. 1981).

disqualified, even though the circumstances making the termination necessary are not attributable to the employer.

A woman who becomes pregnant has to be absent from work for a time. She has no choice. The necessary period of absence can be computed within reasonably accurate perimeters. It is not necessary to rule against persons in the position of this claimant to protect the unemployment fund against claimants who could continue at their jobs, but choose to leave for their own purposes.

Our Court has never held that people in the claimant's position are ineligible for compensation. The policy of the statute would be best served by departing from the appeals cases cited to support the denial of benefits.

I would affirm the judgment of the circuit court.

.....

Charles B. Blackmar, Judge

APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

April 30, 1985

Ms. Julie Levin
Legal Aid of Western Missouri
1103 Grand Avenue
Kansas City, Missouri 64106

Re: Linda Wimberly vs. The Labor and Industrial Relations Commission of Missouri, et al.
No. 66083

Dear Ms. Levin:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's motion for rehearing overruled." Donnelly, J., files revised opinion concurring in result.

Very truly yours,

/s/ Thomas F. Simon
Clerk

cc: Ms. Sharon A. Willis
Mr. Rick V. Morris
Ms. Catherine J. Barrie
Hon. Timothy D. O'Leary
West Publishing Company
Commerce Clearing House
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Prentice-Hall, Inc.

(Filed April 30, 1985)

SUPREME COURT OF MISSOURI
EN BANC

LINDA WIMBERLY,	)	
Respondent,	)	
v.	)	No. 66083
THE LABOR AND INDUSTRIAL	)	
RELATIONS COMMISSION	)	
OF MISSOURI,	)	
and	)	
THE DIVISION OF EMPLOYMENT	)	
SECURITY OF THE STATE	)	
OF MISSOURI,	)	
and	)	
J. C. PENNEY CO., INC.,	)	
Appellants.	)	

OPINION CONCURRING IN RESULT

Although we may be bound to follow the United States Supreme Court's decisions concerning federal statutes as involving uniquely federal questions, *see* Urie v. Thompson, 337 U.S. 163, 174 (1949), in my view we are not so bound as to its pronouncements regarding the United States Constitution.

This is contrary to the views I expressed in 1972 and 1973. *See* Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. banc 1972), and Kraus v. Board of Education of City of Jennings, 492 S.W.2d 783, 784 (Mo. 1973). There I mistakenly accepted the assertion in Cooper v. Aaron, 358 U.S. 1 (1958), that the United States Supreme Court's interpretations of the written Constitution constitute the

"supreme law of the land" under Article VI of the Constitution and are of binding effect on the states. I have since concluded that the *Cooper* assertion is no more than a postulate. *See* A. Bickel, The Morality of Consent 101-102 (1975); L. Tribe, American Constitutional Law 22 (1978); Caine, Judicial Review—Democracy Versus Constitutionality, 56 Temple L.Q. 297 (1983); Donnelly, The [2] State of the Judiciary in Missouri-1982, 3 St. Louis U. Pub. L. Forum 101 (1983). Decisions by the United States Supreme Court in all cases arising under the Constitution should be "binding, in any case, [only] upon the parties to a suit as to the object of that suit * * *." A. Lincoln, First Inaugural Address, March 4, 1861.

I concur only in result.

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Robert T. Donnelly, Judge

APPENDIX C

(OPINION FILED: April 17, 1984)

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LINDA WIMBERLY,	)	
Respondent,	)	No. WD 34909
vs.	)	
THE LABOR AND INDUSTRIAL	)	
RELATIONS COMMISSION OF	)	
MISSOURI, et al.,	)	
Appellants.	)	

Appeal From the Circuit Court of Jackson County
Honorable Timothy D. O'Leary, Judge

Before Pritchard, P.J., Manford, and Nugent, JJ.

This is an appeal from a circuit court judgment reversing an earlier ruling of the Missouri Labor and Industrial Commission, which declared an employee ineligible for unemployment compensation benefits. The judgment is affirmed as modified.

Usually, a cause of action, as is presented herein, finds its origin, review, and disposition exclusively within Chapter 288, RSMo 1978, the Missouri Employment Security Law. Research supports the proposition that this is a case of first impression in Missouri, as it calls for the consideration of whether a particular federal statute is applicable and hence controlling in a claim for unemployment benefits under certain specific circumstances.

The parties are in agreement as to the facts, with one exception. Respondent (hereinafter the employee) contends she was granted a leave of absence with a guarantee of a job upon her return to work. Appellant (hereinafter the Commission) contends that the employee was not granted a leave of absence. Within the disposition of this appeal, it will be observed that the entire question of a leave of absence is immaterial.

[2] The employee worked as a cashier and sales clerk for the J.C. Penney Co., Inc. Her last day of work was August 23, 1980. A formal claim for benefits was filed on December 7, 1980. A deputy for the Division of Employment Security disqualified the employee for benefits upon a finding that the employee left her job without good cause attributable to her work or to her employer.

The employee appealed the disqualification to the appeals tribunal of the Division of Employment Security. On March 9, 1981, a hearing was conducted on the appeal. At this hearing, the employee testified that her last day of work was August 23, 1980, when she took a leave of

absence due to pregnancy. She testified that she had requested a six-months leave of absence. About December 1, 1980, according to the employee's testimony, she requested from the employer a return to her job, and the employer informed her that there were no open positions at the time. Testimony of the employer claimed that the employee did not request a leave of absence, and the employee was undecided about returning to work. In rebuttal, the employee claimed that she was given a leave of absence with a guarantee of re-employment. The employer countered with proof that the employee had previously quit due to a prior pregnancy and was later rehired.

The appeals tribunal affirmed the deputy's ruling, declaring that the employee voluntarily quit her job on August 23, 1980 upon informing the employer that she could not continue working due to her medical condition; and further, that the employer's work policy relative to leaves of absence did not carry a guarantee of re-employment. The appeals tribunal further found that the employee had good cause for leaving her job, but the reason therefor was not attributable to her work or her employer.

The employee requested a review by the Commission, which in turn refused to review the prior decisions of the deputy and the appeals tribunal, and thus in effect, the Commission affirmed the earlier [3] rulings. The employee filed a petition for review in the circuit court. The circuit court reversed the decision of the Commission on April 27, 1983. The Commission filed this appeal.

The Commission presents a sole point, which in summary charges the trial court erred in reversing the Commission's decisions because the court's finding that the employee was not disqualified for benefits was not correct

as a matter of law, because statutory and case authority in Missouri compels a decision that the employee herein be disqualified because she voluntarily left her employment without good cause attributable to her work or to her employer.

In summary, what occurred when this cause was presented to the circuit court was that the court concluded that to deny the employee benefits violated 26 U.S.C. §3304(a)(12), as that federal statute has been interpreted by the case of *Brown v. Porcher,* 660 F.2d 1001 (4th Cir. 1981).[1] The pertinent portion of the particular statute reads as follows:

"§ 3304. Approval of State laws

(a) Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that — . . .

(12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy;"

The above statute was interpreted in *Brown* (see also 502 F. Supp. 946 [S.D.S.C. 1980] for opinion of the United States District Court) when challenge was made to a statute of South Carolina. The claim was presented as a class action and framed the issue of whether women, who were otherwise available and able to work, could be denied unemployment compensation solely because they left work due to pregnancy. The South Carolina Employment Security Commission had denied such benefits upon construction of the South Carolina statute. The [4] South

1. That Missouri's unemployment compensation program is subject to minimum standards prescribed by federal law, see §288.390, RSMo 1978 and 8 C.S.R. 10-4.100.

Carolina Commission ruled that any claimant who voluntarily left work because of pregnancy was disqualified. A challenge was made to that ruling upon the request that §3304(a)(12) be ruled as controlling and that in turn, the South Carolina Commission ruling violated the federal statute. The District Court afforded injunctive and monetary relief for the claimants which was affirmed by the United States Circuit Court of Appeals, 4th Circuit.

The court in *Brown,* 660 F.2d at 1003 noted that the South Carolina Code, §41-35-120(1), provided "that a claimant shall be ineligible for benefits 'if the Commission finds that he has left voluntarily without good cause his most recent work. . .'" The court further noted that although the South Carolina statute did not mention or reference pregnancy, the South Carolina Commission had construed the statute to disqualify any claimant who voluntarily left work due to pregnancy.

In *Brown,* like the instant case, the claimants left work because of physical discomfort and illness occasioned by their pregnancies. Following the births of their children, the claimants tried to return to work, but were informed by their former employers that their job positions were no longer available.[2]

In *Brown,* the court briefly traced the history leading to the enactment of §3304(a)(12). It noted that said section was enacted in light of the decision entered in *Turner v. Department of Employment Security,* 423 U.S. 44, 96 S.Ct. 249, 46 L.Ed.2d 181 (1975). The *Turner* decision was a constitutional challenge to a Utah unemployment compensation statute. The particular statute incorporated

2. It should be noted that under South Carolina law, as ruled by the Commission, compensation is awarded employees whose employers grant maternity leave and to those employees discharged due to pregnancy.

a conclusive presumption of the incapacity of a woman to work from twelve weeks prior to the expected birth of her child until six weeks following the [5] birth, thus rendering her ineligible for benefits.[3] At this point, it is well to advise the reader who is interested in the historical development of the five-party (employers-employees-taxpayers-state government-federal government) relationship relative to unemployment compensation that a reading of *both* decisions in *Brown* is informative on that relationship. There is no purpose served by a recount of that historical development, and thus *Brown* for purposes herein is merely referenced for its precedential value.

In *Brown,* 660 F.2d at 1004, the South Carolina Commission argued (in part, the Commission herein adopts some of the same rationale but by no means holds to that argument exclusively as observed infra) that §3304(a)(12) was intended "only to eliminate the somewhat shorter presumptive periods of disqualification that some states continued to impose after *Turner*' and to 'prohibit states from creating a special category for pregnancy-related claims, and then denying benefits to those claimants thereby basing the denial on the fact of pregnancy alone.'" The South Carolina Commission further argued that it treats pregnant women like any other employee who quits work because of ill health, and hence such practice does not conflict with §3304(a)(12).

The court in *Brown* rejected the contention of the South Carolina Commission. In *Brown* at 1004, the court ruled that §3304(a)(12) is, by its nature and intent, remedial and thus "should be broadly construed." In support of such a finding, the court cited *Tcherepnin v. Knight,* 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed. 2d 564 (1967). The court, armed with *Tcherepnin,* further reasoned that had Congress intended that §3304(a)(12) was merely a codification of *Turner* and intended toward barring discrimination on the basis of pregnancy, then Congress could have so limited the wording of §3304(a)(12).

3. See Utah Code Ann. §35-4-5(h)(2). Prior to 1975, the Missouri law contained a comparable provision. Such is no longer the status of Missouri law and reference to both the Utah and Missouri (prior) provision is solely to illustrate what "spawned" §3304(a)(12) following the *Turner* decision.

[6] After restating §3304(a)(12), the court in *Brown* at 1004 concluded that the words of the statute must be interpreted "in their ordinary everyday senses." *Hanover Bank v. Commissioner,* 369 U.S. 672, 687, 82 S.Ct. 1080, 8 L.Ed. 2d 187 (1962). In *Brown,* the court was presented a letter from the Secretary of Labor which confirmed that the South Carolina statutes had been certified and that the state law had been interpreted to do nothing more than prohibit discrimination and thus did not conflict with §3304(a)(12). The court in *Brown* gave little weight to the Secretary's letter, stating, "As the Supreme Court has recently noted, '[t]he amount of deference due an administrative agency's interpretation of a statute "will depend upon the thoroughness [of] evidence in its consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements . . ."' *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 783, 101 S.Ct. 2142, 2148-49 n. 13, 68 L.Ed. 2d 612 (1981)." *Brown* at 1004-05.

Thus, the court in *Brown* virtually rejected the interpretation offered by the Secretary of Labor under the foregoing criteria, and then ruled, "We therefore conclude that the district court properly declared that the Commission's practices contravened §3304(a)(12)." *Brown* at 1005. In so ruling, the Circuit Court of Appeals, 4th Circuit, ruled that no person shall be denied unemployment compensation solely on the basis of pregnancy or the

termination of pregnancy. In effect, such ruling abolished the need of pregnant female employees to show that the leaving of their job was attributable to the work or to their employers.

The Commission herein first argues that the task of this court is to review the interpretation and application of §288.050.1(1), RSMo 1978 by the Commission and not to review the ruling of the circuit court. *Vaughn v. Labor and Industrial Relations Commission,* 603 S.W.2d 63 (Mo. App. 1980). The Commission also reminds this court of the standard of review in such cases as prescribed in §288.210, RSMo 1978. The Commission further points out that whether the evidence [7] heard by the appeals tribunal establishes good cause for voluntarily leaving employment is a question of law. *Belle State Bank v. Industrial Commission, Division of Employment Security,* 547 S.W.2d 841, 844 (Mo. App. 1977).

From the foregoing, the Commission then contends that the question facing this court is whether the decision of the appeals tribunal (approved by the Commission) was correct in holding that the employee herein was disqualified from receiving benefits because the employee voluntarily left her work without good cause attributable to her work or employer, or whether alternatively, the circuit court, in reversing the Commission's decision, compels non-disqualification from benefits pursuant to §288.050, RSMo 1978 upon the basis prescribed by §3304(a)(12) and as interpreted in *Brown.*

It is the position of the Commission herein that the ruling of the circuit court was erroneous as a matter of law. In support of this conclusion, the Commission offered the following arguments. Citing to §288.050.1(1), the Commission argues that an applicant for benefits is

disqualified "if it is found that the applicant left his work without good cause attributable to his work or to his employer." The Commission cites to *Belle* for a definition of good cause. The Commission points out that the circuit court herein made a specific finding that the employee had no guarantee of re-employment and that she voluntarily left her work without good cause attributable to her work or to her employer. The record shows that the court made such a ruling and it was supported by the evidence. The Commission further argues that the instant case comes within the following authority: *Bussmann Manufacturing Co. v. Industrial Commission,* 335 S.W.2d 456 (Mo. App. 1960), which squarely ruled that an employee who left her job due to pregnancy was disqualified for leaving work without good cause attributable to her work or to her employer.[4] The pertinent portion of the *Bussmann* ruling reads as follows:

> [8] "[T]he purpose of the Employment Security Act is to provide for the compulsory setting aside of an unemployment reserve to be used for the benefit of persons unemployed through no volition of their own. The clause, '* * * voluntarily without good cause attributable to his work or to his employer' comprises a single factual standard which the claimant must prove existed in order to avoid disqualification." *Bussmann* at 461.

It is the Commission's position that the instant case "mirrors" *Bussmann.* The Commission correctly notes that in *Bussmann,* the employee made a specific request for a leave of absence and was refused, whereas in the instant

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4. For a recent decision dealing with illness (non-pregnancy), see *Fifer v. Missouri Division of Employment Security, et al.,* ..... S.W.2d ..... (Mo. App. 1984) (WD 34468, filed February 7, 1984).

case, the evidence (and the court's ruling based upon that evidence) shows that the employee believed she asked for a leave and that it was granted, but that was refuted by the employer. In further support of this contention, the Commission cites to *Neeley v. Industrial Commission of Missouri, Division of Employment Security*, 379 S.W.2d 201 (Mo. App. 1964), wherein the employee was granted a one-year leave of absence, but no return to work guarantee; and the court ruled that the finding of the Commission that the employee, for reasons of pregnancy, had left her employment voluntarily, was reasonable under the evidence upon the record. *Trail v. Industrial Commission, Division of Employment Security*, 540 S.W.2d 179 (Mo. App. 1976) was a case wherein an employee was not disqualified because the circumstances surrounding the employee's leave of absence were construed to the effect that the employee was "laid off from work."

Following reference to *Bussmann, Neeley*, and *Trail*, the Commission directs this court's attention to *Division of Employment Security v. Labor and Industrial Relations Commission*, 617 S.W.2d 620 (Mo. App. 1981). The Commission acknowledges that *Trail* was perhaps a departure from the rulings in *Bussmann* and *Neeley*, but strongly urges that the most recent ruling announced in *Division v. Commission, supra* not only restated the rule in *Bussmann* and *Neeley*, but further defined [9] the issue. This court is referred to the following quoted passage from *Division v. Commission* at 623-624:

> "The question on this appeal may be summarized thusly: Is an employee who takes a leave of absence, the terms of which provide that at the end of the period, the return to work is contingent upon the availability of a job, deemed to have voluntarily left the job without cause attributable to the job or employer, for the purpose of disqualification for unemployment benefits claimed for a period after the employer failed to reemploy at the expiration of the leave period?"

The ruling in *Division v. Commission, supra* was that absence of a guarantee of reemployment and hence the absence of a true leave of absence, placed the employee squarely within the provisions of §288.050, thus rendering the employee disqualified. It is unquestioned that the employee in *Division v. Commission, supra* left her job to take care of her ailing husband and not due to or as a result of pregnancy.

To restate in summary fashion the position of the Commission, it is stated that the employee herein, due to her pregnancy and not having a true leave of absence, thus left her work voluntarily and without good cause attributable to her work or to her employer, and is thus disqualified from benefits under §288.050.1(1).

In confronting §3304(a)(12) and *Brown*, the Commission emphasizes the following portion of the federal statute which prohibits the denial of benefits "solely on the basis of pregnancy or termination of pregnancy." The Commission agrees that the federal statute "encompasses a minimum federal standard to which the states, in their unemployment insurance systems, must conform." It is the interpretation given §3304(a)(12) by the federal court in *Brown* to which the Commission takes exception. The Commission argues in the first instance that the South Carolina statute considered in *Brown* did not contain any clause such as "attributable to the work or to the employer." In the sheer reading of the South Carolina statute, this point is well taken. However, the Commission concedes that the case law of South [10] Carolina has

construed that statute to include the requirement of "work or employer" connection as a prerequisite to a holding upon "good cause" for the voluntary leaving of employment. The Commission herein nonetheless urges this court to draw a distinction, because of the specific language and terminology within §288.050.1(1). In light of the concession by the Commission herein that the courts of South Carolina have, by construction, "imposed" the "work or employer" upon the South Carolina statute, the Commission's argument that the two statutes are distinguishable is without merit.

The Commission herein, in furtherance of its contention, argues that the use of the word "solely" within §3304(a)(12) indicates that Congress meant to prohibit or ban the singling out of pregnancy for disadvantageous treatment. It is the further argument of the Commission that in following *Brown*, the circuit court has imposed upon the Division of Employment Security the requirement of giving preferential treatment to those employees who voluntarily leave their job due to pregnancy over and opposed to those individuals who voluntarily leave their job because of or due to other types of temporary physical disability or personal reasons not related to their job or to their employer.

The Commission urges this court to observe the passage of §3304(a)(12) as resultant legislation following and thus extending the prohibition announced in *Turner*. The Commission provides this court with the following notation from the United States Senate Report, which accompanied §3304(a)(12):

> "In order to qualify for unemployment compensation benefits, a worker must be able to work, be seeking employment and be available for employment. In

> a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits. In 1975 the Supreme Court found a provision of this type in the Utah unemployment compensation statute to be unconstitutional. The Utah requirement had disqualified workers for a period of 18 weeks (12 weeks before birth through 6 weeks after birth). The Court stated that 'a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid.' A [11] number of other States have similar provisions although most appear to involve somewhat shorter periods of disqualification.
>
> The committee bill includes, without modification, the provision of the House bill which would prohibit States from continuing to enforce any provision which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.
>
> S. Rep. No. 94-1265, 94th Cong., 2d Sess. 19-21 (1976)"

From the foregoing passage, the Commission concludes that Congress did not intend to require preferential treatment of pregnancy, but only that Congress was concerned with the elimination of automatic pregnancy qualifications contained in various state laws prior to the ruling in *Turner*.

Continuing, the Commission refers this court to another federal statute and urges this court to apply an analogy which leads to a different result than that entered by the circuit court herein. Attention is directed to 29 U.S.C. §504, *The Rehabilitation Act of 1973*, as amended, 29 U.S.C. §794 (1976 ed., Supp. II), the pertinent portion of which

reads: "No otherwise qualified handicapped individual . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [federally funded] program [solely by reason of his handicap.]"

Relative to an interpretation of 29 U.S.C. §504, the Commission cites *Southeastern Community College v. Davis*, 442 U.S. 397, 405, 99 S.Ct. 2361, 2366, 60 L.Ed.2d 980 (1979), wherein the United States Supreme Court held that §504 does not compel educational institutions to make substantial modifications in their programs to allow disabled persons to participate, but rather, the mere possession of a handicap is not a permissible ground for assuming an inability to function within a particular context. *See also Monroe v. The Standard Oil Co.*, 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981), where it was ruled that an employer was not required to make work schedule accommodations [12] for military reservists regardless of the provisions within the Vietnam Era Veterans Readjustment Assistance Act, Public Law 92-540, 86 Stat. 1074 (1972) and Public Law 93-508, 88 Stat. 1578 (1974), which prohibits the denial of employment benefits because of obligations imposed upon military reservists.

In conclusion, the Commission argues that the holding by the circuit court, whereas §3304(a)(12) as construed by the court in *Brown* is permitted to stand, gives preferential treatment to the employee herein because of her pregnancy, and thus requires Missouri to alter "its traditional approach of disqualifying for benefits those individuals who leave work voluntarily without good cause attributable to the work or to their employers and would increase the financial obligations of Missouri's unemployment compensation fund."

Before proceeding with the disposition of this appeal, it should be noted that following the ruling by the 4th Circuit Court of Appeals, a writ of certiorari was sought, but on January 17, 1983, the United States Supreme Court denied the petition. *Porcher v. Brown*, 103 S.Ct. 796 (1983). That denial was not unanimous, however, as Justice White filed a dissent thereto and was joined by Justices Powell and Rehnquist. Thus, the United States Supreme Court has yet to consider and rule the merits of the question, as a denial of a petition for writ of certiorari is not a ruling upon the merits, nor does it impart any expression on the merits. *Adams Dairy Co. v. National Dairy Products Corp.*, 293 F.Supp. 1135 (W.D.Mo. 1968). The dissent referenced above notes that eight states, and to a lesser extent, a ninth state, have statutes similar to the South Carolina statute ruled in *Brown*. Missouri is noted within this group of states. For other case authority wherein the *Brown* case is mentioned relative to §3304(a)(12), see *Director of Division of Employment Security v. Fitzgerald*, 414 N.E.2d 608 (Mass. 1980), *Sellers v. National Spinning Co. Inc.*, 307 S.E.2d 774 (N.C.App. 1983), *Butts v. Iowa Department* [13] *of Job Service*, 328 N.W.2d 515 (Iowa 1983), and *Piper v. The Singer Co. Inc.*, ... S.E.2d ..... (1984) (No. 83 CA-1446-MR, filed by the Kentucky Court of Appeals January 27, 1984).

This case presents for the first time, in Missouri, the construction of federal statute §3304(a)(12). In cases dealing with the construction of federal statutes, this court is bound by and must follow decisions of federal courts. *Buffalow v. Bull*, 619 S.W.2d 913, 919 (Mo. App. 1981), citing *Haley v. Metropolitan Life Insurance Company*, 434 S.W.2d 7, 11 (Mo. App. 1968). From this rule, it follows that this court must affirm, due to the ruling in *Brown v. Porcher*, the judgment of the circuit court herein.

In reaching this conclusion, this court remains mindful of the following. The United States Supreme Court has yet to rule upon the merits of the question, *Porcher v. Brown,* 103 S.Ct. 796, *supra.* This court recognizes the apparent difference in the interpretation of comparable federal legislation when *Brown* is compared with *Southeastern Community College* and *Monroe.* The decision in *Division v. Commission, supra* has no application to the facts and circumstances presented by the instant case and remains a viable and controlling decision on the question of leaves of absence in *non*-maternity cases. Further, the rulings in *Bussmann* and *Neeley* no longer control in light of the federal ruling in *Brown* and the ruling herein. In addition, this court is also mindful that the phrase, "that he has left his work voluntarily without good cause attributable to his work or to his employer" within §288.050.1 (1) must be construed and applied in conformity with the interpretation and construction applied to §3304(a)(12) under *Brown* in all cases involving female employees who are otherwise eligible for unemployment compensation benefits but who leave their employment for reasons related to pregnancy.

Thus, that portion of §288.050.1(1) quoted above now has a different meaning and application as regards pregnant female employees which arises and results from the ruling in *Brown.* Further, this court remains mindful that the decision herein drastically alters the [14] traditional approach by the Commission regarding disqualification of pregnant female employees. The result is, of course, to create or establish a preferred class of employees relative to disqualification for benefits. In other words, such a ruling has created a special class of claimants who, unlike their fellow employees, do not face potential disqualification due to having left work voluntarily without good

cause attributable to their work or to their employers. Still further, this court remains mindful of the potential cost increase to the already overburdened employment security fund. In the state of South Carolina, an additional cost of 1.5 million dollars has been added. *Porcher v. Brown,* 103 S.Ct. at 797, *supra.*

This court is also mindful that the former ruling in *Brown* was contrary to the expressed position of the Secretary of Labor upon the application of §3304(a)(12) to the South Carolina statute in *Brown.*

While this court may have reservations concerning the soundness of the ruling in *Brown,* this court is at the same time mindful of its having to presently follow the prior ruling in *Brown* under the rule in *Buffalow* and *Haley.*

It is observed by this court that the judgment of the circuit court herein did not prescribe any limitation as to the period applicable regarding the employee's claimed benefits. The employee herein does not contend that she is entitled to any benefits during the period she awaited the birth of her child or any period of time regarding the recovery from childbirth. Rather, she makes claim for benefits for that period during which it was shown that she was able, willing, and available to return to work, but was denied reinstatement due to the unavailability of a job. The employee herein concedes that any woman who leaves her job due to pregnancy is not entitled to unemployment compensation benefits until she can show she is able, willing, and available for employment.

[15] For and upon the reasons set forth herein, the judgment of the circuit court is affirmed but is modified to provide that any and all benefits recoverable by the employee herein are limited only to that period of time

in which she was able and available to return to work, but was denied reinstatement in her employment due to the unavailability of any job or work.

Pritchard, P.J., concurs. Nugent, J. concurs in separate concurring opinion.

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Donald L. Manford, J.

APPENDIX D

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

LINDA WIMBERLY, Plaintiff,	)	
vs	)	CV81-16713
	)	CIVIL DOCKET E
LABOR & INDUSTRIAL RELATIONS, ET AL., Defendants.	)	

JUDGMENT

The Court this day takes up for consideration employee claimant's petition for review of the decision of the Missouri Labor and Industrial Relations Commission denying her unemployment compensation insurance benefits.

The claimant was employed by J. C. Penney Co., Inc. as a sales clerk for approximately three years. On August 22, 1980 she requested a leave of absence which was granted, for a six month period from August 23, 1980 to February 23, 1981. The claimant was 7 months pregnant at the time she requested her leave. On December 1, 1980

the employee informed her employer that she was ready to return to work, but was advised that there was no position available for her at that time.

On December 7, 1980 the employee filed a claim for unemployment compensation. She was ruled disqualified for benefits by a deputy for the Division of Employment Security. The deputy's decision was sustained by a referee on appeal and the Labor and Industrial Relations Commission denied her application for review. The employee claimant then filed for judicial review by this Court.

The referee found that the employee requested and was granted a leave of absence. He found that when she commenced her leave of absence she did not know if the leave guaranteed a rehire. He further found that the employee's [sic] policy regarding leaves of absence did not guarantee reinstatement and that the claimant would have been reinstated only if there were a position available. The referee concluded that the employer was under no obligation to grant claimant a leave of absence that guaranteed her rehire.

He therefore found that claimant voluntarily quit her work on August 23, 1980 without good cause attributable to her work.

[2] This Court is to consider all of the evidence, along with all reasonable inferences therefrom, in a light most favorable to the Commission's ruling. It is not to set aside the ruling unless it is contrary to the overwhelming weight of the evidence. *Union May Stern Co. vs Industrial Commission*. 273 S.W.2d 766 (Mo. App. 1954). The referee's finding as adopted by the Commission is supported by competent and substantial evidence.

The question is this: Is an employee who takes a leave of absence when seven months pregnant for the pur-

pose of having her baby without any express understanding as to whether she is guaranteed to be rehired and without an express understanding as to when she will return to work entitled to benefits when she is not rehired after having her baby? Does the fact that the employer had a policy of not guaranteeing rehiring change the answer?

There exist three applicable Missouri cases. In *Neeley vs Industrial Commission of Missouri,* 379 S.W.2d 201 (Mo. App. 1964), the employee was granted a maternity leave of absence which contained no guarantee of reemployment and the court ruled the employee was disqualified for benefits under §288.050 upon a finding that the employee had voluntarily left work without cause attributable to her work or her employer.

In *Trail vs Industrial Commission of Missouri,* 540 S.W. 2d 179 (Mo. App. 1976), the employee was granted a maternity leave of absence without assurance of reemployment at the end of the leave period and the Court ruled the employee was eligible for benefits for the reason that the unemployment resulted not from the voluntary taking of a leave of absence but from the action of the employer in not rehiring her. *Trail* is inconsistent with *Neeley* in holding that it was not essential to find a guarantee at the expiration of the leave period.

In *Division of Employment Security vs Labor and Industrial Relations Commission of Missouri,* 617 S.W. 2d 620 (Mo. App. 1981), the employee was granted a leave of absence to care for her ailing husband. The leave contained no guarantee of reemployment and the court concluded that the employee was disqualified for benefits under §288.050 upon a finding that the employee had voluntarily left work without cause attributable [3] to her work or her employer.

In discussing the issues the Court observed that if the evidence suggested a finding of a guarantee of rehiring and the employer failed to abide by the guarantee, the claimant employee is qualified for benefits.

Thus, the effect of the unemployment subsequent to an employee's leave of absence must be assessed according to the terms of the leave. The burden is on the claimant to prove the terms of the leave.

The *Division* Court reconciled *Trail,* a case which appears to be inconsistent with all other Missouri Authorities, by stating that even though it was found that claimant received no reassurance of reemployment, the court must find that the court in *Trail* concluded that the leave agreement contemplated that any rehiring would be at the same job and not just any job. The court observed that this has to be the result in order for the rationale in *Lewis* to be applicable and relied upon by the court in *Trail.*

The *Division* Court ruled that in order for a true leave of absence to exist the evidence must show that the employee was guaranteed reemployment. In the absence of proof on this required guarantee, and hence the absence of a bona fide leave of absence, the employee falls within the meaning of §288.050 which is applicable to employees who by their own actions leave work voluntarily without good cause attributable to their work.

To put it another way, unless there is an agreement by the employer to guarantee an unconditional right to return to work, the employee simply voluntarily leaves work and he takes the risk of no work at the end of the leave period.

In this case there is no evidence of a guarantee of reemployment given to petitioner Wimberly. Petitioner's al-

leged assumption on her part that her job was secure is far from a guarantee of reemployment by her employer. She voluntarily left work with no unconditional right to return to work, and therefore the risk of unemployment at the expiration of the leave was undertaken by the employee.

The petitioner also alleges in her petition for review that her disqualification for benefits is violative of 26 U.S.C. §3304(a)(12) which provides that no person shall be denied compensation under state compensation law solely on the basis of pregnancy or termination of [4] pregnancy. Petitioner cites the case of *Brown v. Porcher,* 660 F.2d 1001 (4th Circuit 1981).

The Court in Brown noted that as part of the system of operating grants, the Federal Government has placed a very limited number of explicit conditions on receipt of Federal funds by the States. It stated that, "These standards apply to all States and in the judgment of the Congress are to be ranked as fundamental!"

The Court concluded that Congress imposed a sweeping ban on withholding unemployment compensation from women job seekers because they were pregnant when they left their most recent employment.

It held that the Statute in plain and unambiguous language banned the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women.

The Court rejected the argument that the Commission treated pregnant women like any other employee who quit because of ill health and therefore there was no conflict with the Federal Statute. The Court held that regardless of how other employees with other disabilities are treated, the mandate of the statute as to pregnant women is clear

and, that is, that in no event can they be denied compensation solely on the basis of pregnancy or termination of pregnancy.

Accordingly, the decision of the referee is reversed and the cause is remanded to the Commission to enter an award in accordance with this decision.
April 27, 1983

/s/ Timothy D. O'Leary
Judge Timothy D. O'Leary

Copies mailed to:

Sharon Willis
Julie Levin
GLADYS TYREE, Clerk

APPENDIX E

MOIC-1817-R29-3
3-81

LABOR AND INDUSTRIAL RELATIONS COMMISSION
Jefferson City
ORDER OF THE COMMISSION DENYING APPLICATION FOR REVIEW OF A DECISION OF AN APPEALS TRIBUNAL OF THE DIVISION OF EMPLOYMENT SECURITY

Commission No. LC-1591-81
Appeal No. A-758-81

In the Matter of
Linda Wimberly Claimant
J.C. Penney Company, Inc. Employer
Social Security Number 487-64-8200
Application Filed by Claimant

The Application for Review filed in this matter has been considered by the Commission. After having reviewed the evidence and considered the whole record, the Commission holds that the findings of fact of the Appeals Tribunal are supported by competent and substantial evidence and that the decision of the Appeals Tribunal was made in accordance with the Law.

It is, therefore, ordered pursuant to Section 288.200, RSMo 1978, that the Application for Review be denied.

/s/ John R. Igoe
Chairman John R. Igoe
(SEAL) /s/ Herbert L. Ford
Member Herbert L. Ford
Charles B. Fain (NOT SITTING)
Member Charles B. Fain

NOTICE OF THE ORDER OF THE COMMISSION DENYING APPLICATION FOR REVIEW

I hereby certify that the above is a true and correct copy of the Order of the Commission made on the 17th day of July, 1981, denying Application for Review.

/s/ Mary L. Lanza
Secretary

By virtue of the above Order of the Commission denying the Application for Review, the decision of the Appeals Tribunal is deemed to be the decision of the Commission for the purpose of judicial review under the provisions of Section 288.200 and 288.210, RSMo 1978.

The Commission Decision becomes final ten days after the date of mailing of such decision under Section 288.200.2, RSMo 1978. Within ten days after a decision of the Commission has become final, a party aggrieved thereby may secure judicial review as provided for in Section 288.210, RSMo 1978. THIS MEANS THAT AN AGGRIEVED PARTY HAS TWENTY DAYS FROM THE DATE OF THIS ORDER TO APPEAL TO THE APPROPRIATE COURT FOR JUDICIAL REVIEW.

Date of Mailing July 17, 1981

APPENDIX F

MODES-3422-R1
APP. 9-80
DES-BAP001B-00

State of Missouri
DIVISION OF EMPLOYMENT SECURITY
Jefferson City
DECISION OF APPEALS TRIBUNAL

Appeal No. A-758-81

IN THE MATTER OF THE CLAIM OF:

Linda Wimberly (Claimant) SS No. 487-64-8200
J.C. Penney Company, Inc. (Employer)

Deter. Date: 1-6-81 Appeal Filed: 1-9-81 Filed By: Claimant

A deputy determined under the Missouri Employment Security Law that the claimant was disqualified for benefits until she has earned wages after August 23, 1980, equal to ten times her weekly benefit amount, on a finding that she left her work voluntarily on that date without good cause attributable to her work or to her employer. The claimant filed a timely appeal from that determination.

After due notice to the interested parties the Appeals Tribunal heard the appeal on March 9, 1981, in Kansas City, Missouri. The claimant was present and testified. The claimant was represented by Julie Levin, Esq. The employer's personnel manager was present and testified.

FINDINGS:

The claimant worked for the employer as a sales clerk/cashier for approximately three years at a rate of pay of

$3.50 per hour. The claimant's last day of work was August 23, 1980.

On August 23, 1980, the claimant was approximately seven months pregnant. The claimant requested a leave of absence because she was unable to continue working in her condition. The claimant's child was born on November 5, 1980. At the time the claimant commenced her leave of absence she did not know if the leave guaranteed a rehire. On December 1, 1980, the claimant spoke to the employer's personnel manager, who told her that there was no position available for her at that time. The employer's personnel manager testified that the claimant was placed on a leave of absence but that the leave of absence did not guarantee that she would be reinstated. It was explained by the personnel manager that if there was a position available for her upon her return, she would be reinstated. The employer's personnel manager testified that the claimant was never on a maternity leave as such, and that the leave that she was on did not guarantee reinstatement.

The Missouri Employment Security Law provides that a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages equal to ten times his weekly benefit amount if it is found that he left his work voluntarily without good cause attributable to his work or to his employer.

The Appeals Tribunal finds that the claimant quit her job voluntarily on August 23, 1980, when she informed the employer that she could not continue working because of her medical condition. It is found that the employer's policy regarding leaves of absence does not guarantee reinstatement and that the claimant would have been reinstated only if there was a position available for her. It is found that the employer was under no obligation to

grant the claimant a leave of absence which guaranteed her rehire and that such was not the employer's policy. Although the claimant did have a good reason for leaving her employment, it is found that that reason was in no way attributable to her work or to her employer. Accordingly, it is found that the claimant quit her job voluntarily on August 23, 1980, without good cause attributable to her work or to her employer.

DECISION:

The deputy's determination is affirmed. The claimant is disqualified for benefits until she has earned wages after August 23, 1980, equal to ten times her weekly benefit amount.

Dated and mailed at Jefferson City, Missouri, this 24th day of April, 1981.

CHARLES D. HALTERMAN
APPEALS REFEREE

skd

APPENDIX G

Modes 2084-R14
L.O. 7-80

State of Missouri
Division of Employment Security

DEPUTY'S DETERMINATION CONCERNING
CLAIM FOR BENEFITS

ISSUE NO. 001

1. Claimant's Name and Address:

   Linda Wimberly
   700 Sioux Avenue
   Independence, MO 64056

2. Employer's Name and Address:

   J.C. Penney Company, Inc. 004780
   Southwestern Field Tax Office
   P.O. Box 2405
   Dallas, Texas 75221

3. Benefit Year
   Beginning Date
   of Initial Claim 12-7-80
   Effective Date
   of Renewed Claim .....

4. S.S. No. 487-64-8200

5. Local Office ID No. 500
   Address

   DIVISION OF EMPLOYMENT SECURITY

   15301 East 23rd Street
   Independence, Mo. 64055

ELIGIBILITY ISSUES

☐ CB Code (For Division Use Only)

6. ☐ Eligible beginning .....

7. ☐ Ineligible From ..... to ..... because of reason in item 12 below.

ISSUES FOR WHICH A DISQUALIFICATION MAY BE ASSESSED

8. ☐ No disqualification ..... ☐ Quit

(Date of Act)

☐ Refusal of Work ☐ Discharge

9. [XX] Disqualification: From 12-7-80 because of reason checked below. Claimant can terminate disqualification by earning wages equal to ten times his weekly benefit amount after disqualifying act.

[XX] A. Claimant left work with the above employer voluntarily without good cause attributable to his work or to his employer on 8-23-80

☐ B. Claimant failed without good cause on ..... to apply for or accept available suitable work with .....

☐ C. Claimant retired on ..... pursuant to terms of union contract or established policy of his employer.

10. ☐ Disqualification ..... weeks because claimant was discharged by the above employer on ..... for misconduct connected with his work. Claimant must claim benefits and be eligible for these weeks but he will not be paid.

11. ☐ Disqualification satisfied effective .....

(Date)

12. Reason:

The claimant quit because of pregnancy. She did not request a leave of absence. This was a personal reason for leaving.

See reverse side for applicable section of the Law.

YOUR APPEAL RIGHTS

If you believe this determination is incorrect you may file an appeal at the office shown above, in person or by mail, not later than ten days after the date entered below. If appeal is by mail, the United States post office postmark date will be the date filed. If the last day for filing the appeal falls on Sunday or legal holiday, the filing will be timely if the appeal is filed on the next day which is neither a Sunday or legal holiday. Any appeal should give the reason why it is believed the determination is incorrect. If you do not understand the determination and how to file an appeal, ask the deputy to help you. If the claimant appeals and is unemployed, he should continue to report on his claim. If this determination allows benefits, they will be paid immediately as they become due even if a timely appeal is filed.

Copy of determination mailed or delivered to:

[X] Claimant [X] Employer on 1-6-81

Deputy's Signature Annette Musslin

Annette Musslin

OPPOSITION

BRIEF

No. 85-129

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LINDA WIMBERLY,
Petitioner,

v.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI;
THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI;
and J. C. PENNEY CO., INC.,
Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM L. WEBSTER
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

Broadway State Office Building
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Jefferson City, Missouri 65102-0899
(314) 751-3321

Attorneys for Respondents
The Labor and Industrial Relations Commission of Missouri and The Division of Employment Security of the State of Missouri

October, 1985

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

I

QUESTION PRESENTED[1]

Whether Title 26, U.S.C. § 3304(a)(12) of the Federal Unemployment Tax Act requires the State of Missouri, as a predicate to receipt of federal assistance, to provide unemployment benefits to an otherwise eligible claimant who left her employment due to pregnancy, in a case in which Missouri has based its denial of benefits upon the interpretation and application of a state law which does not single out pregnancy for differential treatment.

---

[1]The respondents have rephrased the question presented from the matter in which it was stated in the Petition. The question presented as stated in the Petition is misleading, because it suggests that the State of Missouri has singled out women who leave their jobs to have children, and who are not reinstated by their employers thereafter, for special discriminatory treatment with respect to eligibility for unemployment compensation benefits. In actual fact, § 288.050.1(1), Mo.Rev.Stat. (1978), as interpreted and applied by the state courts of Missouri and by the respondents, is neutral as relates to sex and pregnancy. If any otherwise eligible Missouri worker, male, female or neuter, leaves a job for a cause not attributable to the work or the employer, whether that cause be good, bad or indifferent, such a worker is ineligible for unemployment compensation benefits. Pregnant women are not singled for differential treatment. For example, Mrs. Wimberly was treated no differently than would have been another worker, male or female, who underwent medical treatment for a cause not attributable to the work place.

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No. 85-129

IN THE

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ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents, the Labor and Industrial Relations Commission of Missouri and the Division of Employment Security of the State of Missouri, do not believe that it is necessary that they make a complete statement of the case. Nevertheless, it is respectfully submitted that the Statement of the Case included in the Petition is unduly argumentative. The Court is respectfully referred to the complete and unbiased statement set forth by the court below in its opinion reproduced at pp. A-2 through A-4 of the Petition (Appendix).

Respondents especially disagree with the manner in which the petitioner characterizes the majority opinion of the

Missouri Supreme Court from which certiorari is being sought. In her Petition, the petitioner characterizes the complete majority decision of the court below in one sentence as a reluctance to disavow a substantial body of Missouri case law upon the basis of the decision of one federal court of appeals rendering a questionable construction of a federal statute. (Pet. at 6). The Petition spends an additional page discussing a short concurring opinion which is not germane to the issue before this Court and the dissenting opinion filed below. Such a cavalier and dismissive treatment of the majority opinion of the court below does not do justice to the sound bases upon which the Missouri Supreme Court founded its conclusions with respect to the issue presented.

The majority opinion below recognized the opinion of the United States Court of Appeals for the Fourth Circuit construing Title 26, U.S.C. § 3304(a)(12) in *Brown* v. *Porcher*, 660 F.2d 1001 (4th Cir. 1981), *cert. den'd*, 459 U.S. 1150 (1983). However, the Missouri Supreme Court declined to follow that case. Among other authority for so declining, the majority opinion below cited the reservations expressed by Mr. Justice White, joined by two other justices, in dissent to the action of this Court in denying certiorari in *Brown* v. *Porcher*, 459 U.S. at ___, 103 S.Ct. at 796-797 (1983). In effect, Justices White, Powell and Rehnquist have already stated a position on the issue presented herein in accord with results reached by the Missouri Supreme Court.

The court below went on to evaluate the clear language of § 3304(a)(12), to conclude that the use by Congress of the qualifying phrase "... *solely* on the basis of pregnancy ..." (emphasis added) indicated an attempt to proscribe only such state laws as denied compensation on the basis of pregnancy alone. In this case, the petitioner was denied unemployment compensation benefits because she left work for reasons which were not attributable to her employer or connected with her work. The Missouri Supreme Court recognized that the state

law resulting in said denial made no express reference to pregnancy.

The Supreme Court of Missouri relied not only upon the clear language of § 3304(a)(12) but upon legislative history with respect to that section as well. In that regard, the court below cited the proposed bill introduced in 1975 which eventually became the federal statute now in question. That proposed law, which was not enacted by Congress, would have unequivocally resolved the matter of unemployment compensation benefits in relation to pregnancy.

Thirdly, the court below found that this case was an appropriate instance in which to defer to the federal agency administering § 3304(a)(12), the Department of Labor. The Department of Labor's construction of that statutory section is consistent with the positions of respondents and with the opinion of the Missouri Supreme Court.

Only after citation to Justice White's dissent from the denial of certiorari in *Brown* v. *Porcher*, examination of the plain language of the statute in question, reference to the legislative history of the statute at issue, and the grant of deference to the United States Department of Labor's construction of that statutory section, did the court below decline to disavow a long and substantial body of Missouri case law in favor of the questionable conclusions reached by the Fourth Circuit in *Brown* v. *Porcher*, *supra*.

It is the decision of the Supreme Court of Missouri, summarized above, to which the petitioner addresses her request for a writ of certiorari. The facts pertaining specifically to the petitioner and the Missouri administrative and judicial proceedings leading up to the judgment and opinion by the Missouri Supreme Court are discussed completely and accurately in the opinion of the Court at pp. A-2 through A-4 of the Petition for Writ of Certiorari.

ARGUMENT

The issue presented in this case is whether 26 U.S.C. § 3304(a)(12) of the Federal Unemployment Tax Act requires the State of Missouri, as a predicate to receipt of federal assistance, to provide unemployment benefits to otherwise eligible claimants who left their employment due to pregnancy. The opinion of the Missouri Supreme Court is that the above-referenced federal statute does not so require. In reaching its decision, the Missouri Supreme Court approved of the administrative position taken by the respondents, the Labor and Industrial Relations Commission of Missouri and the Division of Employment Security of the State of Missouri. The position of the respondents with respect to the issue presented by the Petition for Writ or Certiorari is based upon the provision of a Missouri state statute, which disqualifies a person, regardless of sex, from unemployment compensation benefits, if he or she has "left his work voluntarily without good cause attributable to his work or to his employer ..." Section 288.050.1(1), Mo.Rev.Stat. 1978. Based upon a definitive line of Missouri case law, the Missouri officials responsible for administering unemployment compensation benefits have interpreted the aforesaid state statute to disqualify claimants who quit (leaving one's job without a guarantee of reinstatement is treated as a quit under Missouri law) their jobs on account of personal illness unrelated to the employment. The Missouri statute, together with this interpretation and application by the courts of Missouri and the state officials responsible for administering the unemployment compensation program, is not sex specific nor does it single out pregnancy for differential or discriminatory treatment.

Nevertheless, the petitioner contends that the state statute as interpreted and as applied is contrary to federal law, specifically the provisions of 26 U.S.C. § 3304(a)(12). In support of her Petition for Writ of Certiorari, the petitioner

alleges three reasons why her legal contentions with respect to the applicability of federal law to Missouri unemployment compensation practices merit review by the United States Supreme Court.

1. The petitioner first alleges that the decision below by the Supreme Court of Missouri is in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Brown* v. *Porcher*, 660 F.2d 1001 (4th Cir. 1981). The respondents cannot seriously dispute this contention, but affirmatively state that the decision below was clearly correct as a matter of law and the decision rendered in *Brown* v. *Porcher* is clearly erroneous.

2. The petitioner's second allegation is that the decision below lends to confusion among the several states concerning the proper interpretation of 26 U.S.C. § 3304(a)(12) as it relates to disputes like that which is at the core of this proceeding. In support of this thesis, the petitioner describes the positions of the several states in situations like that of Mrs. Wimberly, purportedly supported factually by research and personal investigation. At this point in time, at least, the respondents have no reason to dispute the conclusion by petitioner that not all states would have reached the same decision with respect to the eligibility of Mrs. Wimberly for unemployment compensation benefits as did the State of Missouri. Assuming *arguendo* that the decision reached in Missouri with respect to the eligibility of petitioner for unemployment compensation benefits would not have been exactly duplicated in all other states does not mandate that this Court grant certiorari. There is absolutely no requirement whatsoever that each of the several states should administer its unemployment compensation program exactly the same as every other state does. Likewise, there is absolutely no requirement that each of the several states shall follow the same criteria for benefits eligibility as do all other states. The statutes under which the several states administer their un-

employment compensation programs are not identical. It must be assumed that the case law of each of the several states reviewing and interpreting dissimilar statutory language with respect to unemployment compensation benefits would be found to differ considerably from state to state. Nevertheless, the Department of Labor has reviewed the programs of all the states referred to in the Petition, and has approved each despite their differences. What is wrong with the thesis of petitioner and what make that thesis irrelevant is the erroneous premise upon which it is based; that there must be absolute uniformity among the several states with respect to the manner in which their unemployment compensation programs are administered. It proves nothing to allege that State "A" may have found Mrs. Wimberly eligible for unemployment compensation benefits whereas Missouri did not. There is no requirement that State "A" and Missouri reach the same decision on such an issue. Furthermore, State "A", and the research and investigation conducted by the attorneys for petitioners does not disclose the positions of the several states in this regard, may not disqualify from benefits any person who left his or her previous employment for a good reason, whether or not that reason was related to his or her employment or employer. Section 3304 sets forth minimum standards for state compliance. No state is prohibited from being more liberal on eligibility determinations. In short, it is not necessary that this Court grant review in order to insure that all states will administer their unemployment compensation programs identically, because there is no legal requirement whatsoever that one state must administer its program the same way as any other state would.

3. The last stated basis which petitioner alleges as reason to grant review by certiorari is that the conflict between the decision of the court below and of the Fourth Circuit in *Brown* v. *Porcher* somehow affects the orderly administration of the federal unemployment compensation program. It is

difficult to articulate, and indeed the petition does not clearly articulate, how this stated basis for certiorari differs from that discussed immediately *supra*. In practical affect, the petitioner actually uses part III of her petition in an attempt to frame this case as involving a "women's issue", suggesting sexual discrimination and an intent on behalf of the State of Missouri to discourage child birth. The reasons why uniformity of program among the several states is not required have already been discussed. The petitioner's attempt to frame the issue in terms of women's rights should simply be disregarded. The state statute placed at issue, and its interpretation and application by Missouri state courts and administrative officials, is absolutely sex neutral and does not single out pregnancy, or any other condition or reason for leaving one's employment, for differential or discriminatory treatment. In fact, the contrary is true. In Missouri, pregnant claimants are similarly situated to all other claimants, male or female, who leave their employment for health reasons. To create a special exception for pregnant women, as the court in *Brown* v. *Porcher* did and as the petitioner asks this Court to do, would mean that all other claimants who leave their employment for health or other good reasons would be denied equal protection under the law. Respondents respectfully suggest that 26 U.S.C. § 3304(a)(12) does not require the establishment of a preferential class of pregnant claimants under the Missouri Unemployment Compensation Law.

In addition, to the inefficiency of the bases stated by petitioner in support of her request that a writ of certiorari be granted, there are affirmative reasons why the petition should be denied. The decision below was clearly correct and the adoption of the petitioner's position on the merits would result in discriminatory determinations of benefits eligibility based upon sex and pregnancy alone.

I.

THE DECISION BELOW WAS CLEARLY CORRECT

The respondents do not dispute that the decision below is inconsistent with the conclusion reached by the United States Court of Appeals for the Fourth Circuit in *Brown* v. *Porcher,* 660 F.2d 1001 (4th Cir. 1981), *cert. den'd,* 459 U.S. 1150 (1983). However, respondents do submit, that the decision below represents the correct disposition of the issue presented in the Petition for Writ of Certiorari, and that the correctness of the decision below warrants the denial of the writ. In the alternative, the fact that the opinion below does represent the correct resolution of the legal issue presented would warrant, pursuant to U.S.Sp.Ct.Rule 23.1, 28 U.S.C.A., summary disposition of this case on the merits in affirmance of the decision of the Supreme Court of Missouri.

In dissenting to the denial of certiorai, in *Brown* v. *Porcher, supra,* three Justices of this Court, Justices White, Powell and Rehnquist, clearly expressed misgivings about the validity of the opinion of the Fourth Circuit.

> It is by no means clear, however, that § 3304(a)(12) does not simply provide that pregnancy must be treated like all other disabilities—that pregnancy simply cannot be singled out for unfavorable treatment. The Department of Labor adheres to such an interpretation and thus disagrees with the Fourth Circuit's interpretation of § 3304(a)(12).

459 U.S. at 1150, 103 S.Ct. at 797 (1983). The doubts expressed by these three Justices is clearly justified in light of the facts that the clear language of the federal statute would clearly lead to the result reached by the court below, the legislative history of the federal statute supports the decision of the court below, and the federal agency which administers the

unemployment compensation program concurs with the policy adopted by the respondents.

The federal statute prohibits states from denying unemployment compensation "solely on the basis of pregnancy or termination of pregnancy". The qualifying term "solely" is crucial to the determination of the intent of Congress. It denotes that Congress meant only to ban the singling out of pregnancy for disadvantageous treatment. Missouri does not single out pregnancy for disadvantages or discriminatory treatment. Any person, male or female, who leaves his or her employment for a good medical reason, not associated with the work place, or any other good and valid reason, and whose previous job is not thereafter available to him or her, is ineligible for unemployment compensation benefits under Missouri law. The disqualification of Mrs. Wimberly was not "solely" due to her pregnancy, but due to the application of Missouri law, policy and precedent which treats persons who have left their jobs for reasons not attributable to the work place as having voluntarily terminated their employment. *Fifer* v. *Missouri Division of Employment Security,* 665 S.W.2d 81 (Mo.App., W.D. 1984); *Duffey* v. *Labor and Industrial Relations Commission,* 556 S.W. 195 (Mo.App., St.L.D. 1977); *Bussman Manufacturing Co.* v. *Industrial Commission of Missouri,* 335 S.W.2d 456 (Mo.App., St.L. 1960); *Bussman Manufacturing Co.* v. *Industrial Commission of Missouri,* 327 S.W.2d 487 (Mo.App., St.L. 1959); *Division of Employment Security* v. *Labor and Industrial Relations Commission,* 617 S.W.2d 620 (Mo.App., W.D. 1981); *Neeley* v. *Industrial Commission of Missouri,* 379 S.W.2d 201 (Mo.App., K.C. 1964); and *LaPlante* v. *Industrial Commission of Missouri,* 367 S.W.2d 24 (Mo.App., St.L. 1963). Missouri has not created a special category for pregnancy-related claims. Therefore, the petitioner was not denied the benefits "solely" on the basis of pregnancy.

The legislative history associated with the passage of

§ 3304(a)(12) supports the interpretation given that statute by the court below. We quote from the Senate report accompanying the legislation that became § 3304(a)(12):

> In order to qualify for unemployment compensation benefits, a worker must be able to work, be seeking employment and be available for employment. In a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits. In 1975 the Supreme Court found a provision of this type in the Utah unemployment compensation statute to be unconstitutional. The Utah requirement had disqualified workers for a period of 18 weeks (12 weeks before birth through 6 weeks after birth). The Court stated that "a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid. A number of other States have similar provisions although most appear to involve somewhat shorter periods of disqualification.
>
> The committee bill includes, without modification, the provision of the House bill which would prohibit States from continuing to enforce any provision which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.

S.Rep. No. 94-1265, 94th Cong., 2d Sess. 19-21 (1976). Furthermore, as originally introduced, the federal statute would arguably have produced the result urged upon the Court by the petitioner and accepted by the Fourth Circuit. S. 2079, 94th Cong., 1st Sess. § 8(a) (1975), H.R. 8366, 94th Cong., 1st Sess. § 8(a) (1975). When Congress deleted the additional language from the statute before enacting the final version of

§ 3304 (a)(12), it provided persuasive evidence of an intent not to create the result reached by the Fourth Circuit in *Brown* v. *Porcher*. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Nachman Corp.* v. *Pension Benefit Guarantee Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting).

Finally, the Department of Labor, which is responsible for the administration of federal responsibilities under the Federal Unemployment Tax Act, has interpreted § 3304(a)(12) only to prohibit laws which create a special category for pregnancy-related claims.

> The new provision requires that the entitlement to benefit of pregnant claimants be determined on the same basis and under the same provisions applicable to all other claimants. It does not mean that pregnant claimants are entitled to benefits without meeting the requirements of the law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether she meets the statute's conditions for receipt of benefits.

U.S. Department of Labor, Employment and Training Administration Unemployment Insurance Service "Draft Language Commentary to Implement the Unemployment Compensation Amendments of 1976—Public Law 94-566" at 62. Furthermore, the Department of Labor has certified the Missouri Unemployment Program as complying with all federal minimum requirements, which requirements include § 3304(a)(12).

II.

ADOPTION OF THE PETITIONER'S POSITION ON THE MERITS WOULD RESULT IN DISCRIMINATORY DETERMINATIONS OF BENEFITS ELIGIBILITY BASED UPON SEX AND PREGNANCY ALONE

Under the situation as it presently exists in Missouri, and as the State's policy was applied to the petitioner, pregnant claimants for unemployment benefits are similarly situated to all other claimants, male or female, who leave their employment for health reasons. To carve out a special classification or exception for pregnant claimants based upon a tortured interpretation of federal statute, would have the result that all other claimants who leave their employment for health reasons, or for other good reasons, would be treated less advantageously than pregnant women. In practical effect, the petitioner is requesting that Missouri adopt a policy which would discriminate against all persons who left their jobs for good reasons but for reasons which were not connected to their employer or to their job, and were not rehired by their previous employers, unless those persons happen to be pregnant women. Respondents submit that Congress did not intend, by enactment of 26 U.S.C. § 3304(a)(12), to establish a preferential class of pregnant claimants under state law. We submit that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the result which is advocated by the petitioner and the result which was reached by the Fourth Circuit. *Reed* v. *Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Orr* v. *Orr*, 440 U.S. 258, 99 S.Ct. 1102, 59 L.Ed.2d 206 (1979), *on remand* 374 So.2d 895, *writ den'd* 374 So.2d 898, *appeal dismissed, certiorari den'd* 100 St.Ct. 993; *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 99 S.Ct.

2282, 60 L.Ed.2d 870 (1979), *on remand Fenney* v. *Commonwealth of Massachusetts*, 475 F.Supp. 109, *aff'd* 100 S.Ct. 1075; *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

The disposition by the court below of the issue presented by the Petition for Writ of Certiorari is legally valid, and the contrary position taken by the Fourth Circuit in *Brown* v. *Porcher*, is incorrect. If § 3304(a)(12) required the result reached by the Fourth Circuit, or the result urged upon the Court by the petitioner, then said statute would require the State of Missouri to act in violation of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1985

SUPPLEMENTAL

BRIEF

No. 85-129

In the Supreme Court of the United States

OCTOBER TERM, 1985

LINDA WIMBERLY,
Petitioner,

vs.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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No. 85-129

In the Supreme Court of the United States

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LINDA WIMBERLY,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner files this Memorandum in reply to the points raised by the Solicitor General in his Memorandum for the United States as Amicus Curiae.

1. The Solicitor General states that the Fourth Circuit Court of Appeals decision in *Brown v. Porcher,* 660 F.2d 1001 (4th Cir. 1981) was erroneous and that the Missouri Supreme Court was correct in finding that 26 U.S.C. §3304(a)(12) of the Federal Unemployment Tax Act does not prohibit the disqualification for unemployment benefits of people who leave their jobs due to preg-

nancy when other separations from employment due to disability (unrelated to the job) are treated the same. Solicitor General's Memorandum p. 2 (hereinafter "S.G. Memorandum"). The Solicitor General maintains that both the language and legislative history of §3304(a)(12) support his position. Although petitioner does not propose to fully discuss the merits of this case in a Reply Memorandum on a Petition for Writ of Certiorari, a very brief summary[1] of the merits is necessary to dispel the notion that the Missouri Supreme Court is clearly correct.

First, the language of 26 U.S.C. §3304(a)(12), "[n]o person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy", supports the Fourth Circuit interpretation. These words are simple and clear—they prohibit the disqualification for unemployment benefits of women merely because they left their job due to pregnancy.

The Solicitor General interprets the law as though it had been enacted as "no person shall be denied compensation discriminatorily because of pregnancy." Congress did not, however, adopt that language and the fact that disabled people are treated similarly in Missouri has no relevance to the instant case where petitioner was denied benefits solely because of her pregnancy.

The evolution of the language of 26 U.S.C. §3304(a)(12) also establishes that Congress intended the statute

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1. The Solicitor General refers this Court to pp. 7-16 of his Brief as Amicus Curiae in *Porcher v. Brown*, No. 81-1972 as providing further details on his analysis of the merits of the issue in this case. In an effort to avoid a premature briefing of the merits of this case, petitioner also refers the Court to the discussion of the merits in Respondents' Brief in Opposition to Certiorari and the Reply of Respondents to Brief for the United States as Amicus Curiae filed in this Court in *Porcher v. Brown*, No. 81-1972.

to be far more than an antidiscrimination statute. The first draft of the statute introduced in the 94th Congress was H.R. 8366 and its companion S. 2079. That draft contained a paragraph which provided:

> "no person shall be denied compensation under such State law solely on the basis of pregnancy and determinations under any provision of such State law relating to voluntary terminations of employment, availability of work, active search for work or refusal to accept work shall not be made *in a manner which discriminates on the basis of pregnancy.* H.R. 8366 §8 (Emphasis added.)

This first draft was the type of antidiscrimination statute envisioned by the Solicitor General in his interpretation. The antidiscrimination language was deleted, however, and by the time another bipartisan bill (H.R. 10210) was ultimately adopted, the pregnancy provision had been transformed into its present language. The present version eliminates all reference to banning "discrimination." By striking this limiting language, the drafters made clear their intent to write something more comprehensive than the antidiscrimination statute which appeared in the initial bill. Congress demonstrated a clear intent to enact broad, remedial legislation. Recognizing the broad, remedial purpose of the law, the Fourth Circuit construed the statute to give effect to that purpose. *Brown v. Porcher* at 1004.

Second, other aspects of the legislative history behind 26 U.S.C. §3304(a)(12) establish the intent of Congress to prohibit the disqualification of women in petitioner's situation. In 1975 Congress became aware of problems that otherwise eligible women were having in obtaining unemployment compensation if they were pregnant and

left their jobs due to pregnancy. At that time, this Court held in *Turner v. Department of Employment Security,* 423 U.S. 44 (1975) that unemployment compensation insurers could not automatically presume that a woman was unable to work simply because she had reached a certain stage in her pregnancy. Other inequities concerning the attempts of pregnant women or formerly pregnant women in obtaining unemployment compensation came to the attention of Congress and, as a result, Congress conducted a survey of state laws on the subject of pregnancy and unemployment compensation. Congressional staffers discovered two problems and concluded that:

> Nineteen states have special disqualification provisions pertaining to pregnancy. Several of those provisions hold pregnant women unable to work; the remainder disqualify a claimant because she left work on account of her condition or because her unemployment is the result of pregnancy. H.R. Rep. No. 94-775, 94th Cong., 1st Sess., p. 7 (1975).

Congress found both types of disqualifications to be "inequitable in that they deny benefits without regard to the woman's ability to work, availability for work or efforts to find work." *Id.* p. 50.[2] The disqualification of

2. Numerous other references throughout the legislative history underline Congress' desire to provide benefits so long as eligibility criteria—ability to work, availability for work, and efforts to find work—are met. S.Rep. No. 94-1265, 94th Cong., 2d Sess., pp. 19-21 (1976); Committee Print of the Subcommittee on Unemployment Compensation of the Ways and Means Committee of the House of Representatives, "Information to Accompany H.R. 10210. . .," p. 12 (1975); Committee Print, "Unemployment Compensation Amendments of 1976: Description of the Provisions of H.R. 10210 (Public Law 94-566)," Prepared by the Staffs of the Senate Committee on Finance and the House of Representatives Committee on Ways and Means, p. 6 (1976); 122 Cong. Rec. 22516 (Rep. Abzug, July 19, 1976); 22518 (Rep. Steiger, July 19, 1976).

disabled claimants was never considered by Congress; its only focus was on securing unemployment compensation for women who are left without benefits due to their pregnancy. Because pregnancy is such a common condition that affects so many women in the work force, Congress was addressing this special need of women.

2. The Solicitor General indicates that only those states within the Fourth Circuit are bound by and have been affected by *Brown v. Porcher* and that therefore, the conflict that exists between the Fourth Circuit and the Missouri Supreme Court will have little impact on the rest of the country. Such a position, however, overlooks the actions of four states (none of which are in the Fourth Circuit) that changed their policies toward pregnant claimants shortly after the *Brown v. Porcher* decision in an effort to adapt their policies to conform to that decision. These states were Kentucky,[3] Louisiana,[4] Nebraska[5] and New Mexico.[6] Moreover, although state agencies may

3. In *Frieda M. Lewis v. Copper Still,* Appeal No. 80-13665 (May 19, 1981), the Kentucky Unemployment Insurance Commission held that Kentucky's voluntary quit statute was preempted by federal law as interpreted in *Brown v. Porcher.* The Commission held that this case was precedent for all future applicable pregnancy related separation cases. This decision is attached hereto as Exhibit 1.

4. Al Davis, Legal Counsel for the Louisiana Office of Employment Security, advised counsel in a March 25, 1986 telephone conversation that Louisiana changed its disqualification policy towards pregnancy related separations in order to conform to *Brown v. Porcher.*

5. Jerry D. Slominski, Legal Counsel for the Nebraska Department of Labor, Division of Employment, advised counsel by telephone on March 25, 1986 that Nebraska changed its policy towards pregnancy disqualifications because of the *Brown v. Porcher* decision.

6. Connie Reischman, Legal Counsel for the New Mexico Employment Security Department, advised counsel by telephone on March 26, 1986, that New Mexico eliminated its disqualification of claimants due to pregnancy in 1983 because of the *Brown v. Porcher* decision.

not technically be bound by federal judicial decisions other than those issued by the United States Supreme Court, conscientious state administrators, attempting to determine their obligations under federal law, would naturally look to existing federal case law to guide them in setting their policies. That is exactly what happened in the four states mentioned above. When faced with the obvious conflict between the Fourth Circuit and the Missouri Supreme Court, state administrators will experience great difficulty in determining the lawful method of handling the numerous cases of pregnancy related separations that will continue to arise.

In footnote 1 on p. 5 of his Memorandum the Solicitor General asserts that there are only two reasons why a state would have eliminated its disqualifications for voluntary separations due to pregnancy: "(1) either the state approves of that approach as a matter of policy; (2) or (sic) the state believes that the issue is not significant enough to warrant litigation." The Solicitor General, however, fails to mention the most likely explanation—state administrators are conscientiously attempting to follow the dictates of federal law and the only federal appellate court that has interpreted this law.

The Solicitor General suggests that even though a conflict exists between the Fourth Circuit and the Missouri Supreme Court, it is of no consequence since it only means that one of the decisions is wrong and that "one of the parties in either *Porcher* or this case has wrongfully been denied relief." S.G. Memorandum p. 4. Such a suggestion reduces the questions presented in this case and in *Brown v. Porcher* to a factual dispute that would only affect the two parties involved. This is a complete distortion of the case. These two cases involve the interpretation of a federal statute, 26 U.S.C. §3304(a)(12). This federal statute governs all state employment security agencies. Each of these agencies regardless of whether it currently follows *Brown v. Porcher* has a substantial interest in this Court's interpretation of that statute. The mere fact that an agency presently prohibits the denial of benefits to women who leave their jobs due to pregnancy does not guarantee that the agency will continue to do so. Every state is in a position to change its policy at any time, especially in light of the two diverse court opinions on this issue. Without this Court's resolution of the significant conflict between the Fourth Circuit and the Missouri Supreme Court, state agencies will be left to interpret the federal statute on their own.

The Solicitor General also suggests that this case is unworthy of the Court's attention because only five[7] jurisdictions do not grant benefits to women for pregnancy related separations from employment and therefore, only these jurisdictions would have an interest in this case. The Solicitor General's position can be challenged on two grounds: 1. Non-compliance with federal law by five jurisdictions should not be dismissed summarily as an insignificant matter. 2. The fact is that more than five jurisdictions are concerned with the outcome of this case. In view of the uncertainty surrounding the proper interpretation of the federal law, any jurisdiction could change its policy regarding pregnancy related separations. Moreover, the question presented in this case concerns nearly twenty-one million women in the United States who ar

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7. The Solicitor General repeatedly refers to "...y four jurisdictions" as not following *Brown v. Porcher* ...therefore, ...case. As- asserts that only four states have an interest in ...fails to include suming *arguendo* that this reasoning is correct, ... Missouri as one of the affected jurisdictions.

of child bearing age (18-34) and who are in the civilian labor force.[8] As noted in petitioner's Petition for Writ of Certiorari, approximately 85% of women in this age group are likely to give birth at least once.[9] Pregnancy is a recurring state for many women, and the need for women to have a source of income increases significantly as they have one or more children.

3. The Solicitor General maintains that the treatment of voluntary departures for unemployment compensation purposes is not a matter on which uniformity has been required or even encouraged by Congress. Although it is correct to say that Congress does not mandate uniformity in all areas of employment security, Congress has mandated certain fundamental standards that all states must follow. *Steward Machine Co. v. Davis,* 301 U.S. 548, 594 (1937). These standards are codified in 26 U.S.C. §§3301-3311. One such standard can be found in 26 U.S.C. §3304(a)(12). The mandatory language in this law does not give states any discretion to choose whether to comply with this standard.

The question then remains—which interpretation of this mandatory standard is correct—the interpretation of the Fourth Circuit Court of Appeals or of the Missouri Supreme Court? Regardless of which interpretation is correct, the state employment security agencies need to know whether their policies conform to federal law or whether they violate the law and are in jeopardy of being challenged.

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8. See n. 15 of petitioner's Petition for Writ of Certiorari p. 16.

9. *Id.* n. 16 p. 16.

CONCLUSION

The Solicitor General does not deny that a conflict exists between the Fourth Circuit and the Missouri Supreme Court. This conflict deals directly with each court's determination of a federal question—the interpretation of a federal statute. Despite the claims of the Solicitor General that this case involves only a "technical conflict" of little significance, certainly there exists a great disparity in the interpretation of this federal statute. Such a disparity has caused and will continue to cause considerable uncertainty among the state employment security agencies and women who are potential claimants for unemployment benefits. This Court is the only forum that can resolve once and for all the critical question of whether women are entitled to unemployment compensation benefits when they are denied reinstatement in their jobs after giving birth.

It is therefore respectfully requested that this Court grant petitioner's Petition for Writ of Certiorari.

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April 1986

EXHIBIT 1

11052 Christian County
Mailed May 19, 1981

C.O. # 25886
A.D. # 80-13665 UCEE

COMMONWEALTH OF KENTUCKY
KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION

FRANKFORT

FRIEDA M. LEWIS
SS NO. 403-86-9915

APPELLANT

V.

COPPER STILL

APPELLEE

ORDER

* * * * *

Claimant appealed from a referee decision mailed January 26, 1981, affirming an adjusted determination which held she had voluntarily quit her most recent work without good cause, and disqualified her from benefits for the duration of the ensuing period of unemployment.

Claimant, Ms. Lewis, began work for this employer in early August, 1980. She was well into the second trimester of pregnancy at the time of hire, and made known her condition to the employer. Despite his knowledge of claimant's pregnancy the employer apparently hired her without reservation or condition.

On November 7, 1980, some four weeks prior to her expected date of delivery, claimant informed the employer

that she needed to leave her employment at that time, and to remain in non work status until after the birth of her baby, and until released by her physician for return to work. The firm has no established policy providing for the granting of maternity leave, either with or without pay. Claimant was told simply that she would be returned to duty when released by her physician if work were available at that time.

Subsequent to release by her physician as able to return to duty, claimant sought re-employment with the firm. She was told that no work was available at that time, and was advised to maintain periodic contact with the firm for possible future employment. At the time of the referee hearing, claimant remained unemployed.

The Commission notes that the appellee-employer has offered for inclusion in the record, an affidavit executed by Mr. Ben S. Wood III, general partner and owner of Ben S. Wood Enterprises, doing business as the Copper Still, the employer involved in this appeal. Appellee seeks to show by his affidavit that claimant, Ms. Lewis, refused re-employment with his firm after the birth of her child.

The employer failed to appear and offer testimony at the referee hearing set in this matter on January 22, 1981. There has been no showing that his attendance at the hearing was prevented by compelling or unusual circumstances, therefore the Commission may not consider his affidavit in reaching its conclusion on the issue.

KRS 341.370 (1)(c) provides that "a worker shall be disqualified from receiving benefits for the duration of any period of unemployment with respect to which he has left his most recent suitable work voluntarily without good cause attributable to the employment."

The referee reasoned that claimant had left her employment voluntarily, because of personal reasons not attributable to the employment, and was therefore, disqualified from receipt of benefits under the above section of the statute. The referee's ruling was in keeping with then current policies.

Counsel for the claimant argues that denial of unemployment insurance benefits to his client is violative of 26 USC section 3304 (a)(12), which provides, in pertinent part, that "no person shall be denied compensation under such state law solely on the basis of pregnancy or the termination of pregnancy." He cites in support of his contention *Brown v. Percher* (sic), 502 F. Sup 946 (1980). In that case the United States Federal District Court, South Carolina District, in considering a case similar to the instant one said:

> "In plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women (26 USC Supra). These plain words must necessarily be construed to convey their ordinary meaning. (citations omitted). If Congress intended a more limited prohibition or carved out exceptions, it would not have imposed a "fundamental standard" using such broad and sweeping language. . . . The language it did use, however, obviously left no room for exceptions. It does not permit denial of benefits, as in South Carolina, solely because (1) a woman, for pregnancy-related-medical reasons, voluntarily left work to have a child rather than wait for her employer to fire her, (2) a woman was refused a maternity leave or her leave had no fixed terminal date, or (3) a woman attempted to return to her job

> either before or after her maternity leave was scheduled to expire. The plain and unambiguous words of the enactment do not contemplate consideration of such irrelevant factors."

We note that the South Carolina statute is similar to ours in providing a benefit disqualification for a voluntary leaving of employment without good cause. It differs to the extent that the statute itself does not require that the good cause be attributable to the employment. The South Carolina Courts however, had interpreted the language of the statute to imply that the good cause must have been attributable to the employment.

We are convinced that the Court's ruling in the Carolina case is applicable here. 26 USC 3304 (a)(12) leaves little room for an opposite finding. The single difference in statutory provision, as pointed out earlier, is that Kentucky law explicitly requires that the good cause referred to in the statute be attributable to the employment. Counsel for the employer argues that because of this provision, claimant clearly must be denied benefits, absent a successful challenge to the statute on grounds of unconstitutionality. He correctly argues that this Commission is not the proper forum for such a challenge.

Section 980 of the statute, under construction of the chapter, provides in pertinent part: (1) in enacting this chapter it is the intention of the general assembly to comply with the requirements of the federal unemployment tax act and all subsequent amendments including, but not limited to P.L. 94-566 and P.L. 95-19. We may, then my (sic) means of interpretation assure that the statute remains in substantial compliance with the federal enactment. In view of the clear mandate of 26 USC 3304 (a)(12), claimant may not be denied benefits when her separation was clearly

caused by pregnancy. We intend no weakening of the "attributable to the employment" clause contained in KRS 341.470 (1)(c), but hold simply that, in this particular class of case, the statute's limitations are preempted by federal law. Where, as here, the federal statute preempts our own and mandates payment of benefits in cases such as the instant one, and where state statute prohibits payment of benefits unless the separation is attributable to the employment, clearly the federal mandate requires that the separation be found to be attributable to the employment.

Finally, appellee questions claimant's eligibility for benefits under section 341.350 of the act. This issue was not prevously raised either at the local office level or during the referee hearing, and is not properly before this Commission. Under Kentucky law, eligibility is determined on a week by week basis, and since the issue was not part of this appeal, it must be presumed that claimant had satisfied the requirements during her normal claims filing procedure.

This order will constitute precedent for all future cases where the loss of employment can be directly attributed to pregnancy, or termination of pregnancy. This precedent does not apply to those workers who seek and are granted maternity leave, during the time of their leave, or those who elect to totally sever the employment connection when leave of absence is available. For those employees in the former category, employment has not been lost, for those in the latter, pregnancy or termination thereof was not the cause of loss of employment.

WHEREFORE, the Commission, having reviewed the entire record and being advised, sets aside the decision of the referee and holds claimant left her most recent work voluntarily with good cause attributable to the employment. She is qualified for benefits for all weeks for which otherwise eligible.

The full Commission concurs.

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AMICUS CURIAE

BRIEF

No. 85-129 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

LINDA WIMBERLY, PETITIONER

v.

LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-129

LINDA WIMBERLY, PETITIONER

v.

LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Petitioner challenges the decision of the Missouri Supreme Court that a state does not violate the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3304(a)(12), by imposing a disqualification from receipt of unemployment benefits upon women who leave their jobs because of pregnancy when it imposes an identical disqualification on all claimants who leave their jobs because of a physical illness or disability unrelated to their employment. Petitioner asserts that the Court should grant review here because the Missouri Supreme Court's decision conflicts with that of the Fourth Circuit in *Brown* v. *Porcher*, 660 F.2d 1001 (1981), cert. denied, 459 U.S. 1150 (1983), where

the court of appeals held that South Carolina's policy of denying benefits under these circumstances violated FUTA.

2. It is the view of the United States that the Missouri Supreme Court's decision in this case is correct. The reasons for our conclusion that FUTA does not prohibit disqualification for unemployment benefits of persons who leave work because of pregnancy, when other departures for physical disability unrelated to employment are treated the same, are set forth in detail at pages 7-16 of our brief as amicus curiae in *Porcher* v. *Brown,* No. 81-1972 (cited by petitioner, at Pet. 9-11), where we maintained that the Fourth Circuit's decision was erroneous. Accordingly, we will not repeat that analysis at length here. Briefly, both the language and legislative history of Section 3304(a)(12) indicate that Congress meant to ban only state laws that single out pregnancy for disadvantageous treatment; it did not intend to require states to afford preferential treatment to pregnancy. And this has been the consistent interpretation of the Department of Labor, which is the agency responsible for the administration of FUTA and which played a role in the development of the 1976 legislation. Accordingly, the Missouri Supreme Court correctly concluded that the Missouri statute does not violate FUTA because it does not single out for disadvantageous treatment voluntary separations due to pregnancy, as opposed to voluntary separations for other health or personal reasons unrelated to employment.

Despite our view that the Fourth Circuit's decision in *Porcher* was wrong, we concluded that it did not merit review by this Court because of its limited impact. See U.S. Amicus Br. at 17-24. The unemployment compensation scheme of South Carolina involved in *Porcher* and that of Missouri involved here are somewhat unusual; most states do not impose a disqualification for voluntary departures due to disability, and therefore the issue presented here

could not arise. At the time we filed our brief in *Porcher*, there were only nine jurisdictions in which this issue could arise. Moreover, within the Fourth Circuit, only West Virginia in addition to South Carolina had an unemployment policy that could implicate this issue; thus, there were only two states affected by the erroneous decision in *Porcher*. Because the direct effect of *Porcher* was so limited, because we believed that the erroneous decision there could well turn out to be an aberration that would not be followed by other courts, and because the issue had significance in relatively few states nationwide, we concluded that the *Porcher* decision did not merit Supreme Court review.

3. Developments in the intervening years since *Porcher* was decided lend further weight to this conclusion. Petitioner notes (Pet. 11-12) that, of the eight jurisdictions (apart from South Carolina) listed in our brief in *Porcher* as having policies under which the issue presented in this case could arise, several have changed their policies, either eliminating entirely disqualifications on the basis of physical disability (Louisiana) or specifically eliminating pregnancy-related disqualifications. Thus, according to petitioner (Pet. 12-15), there remain only four jurisdictions (the District of Columbia, Minnesota, North Dakota and Vermont) in which the issue presented here can still arise. Moreover, the Missouri Supreme Court in this case specifically rejected *Porcher*, correctly holding that Missouri law complied with the requirements of FUTA. This decision, particularly in light of the court's recognition that some deference is ordinarily due to a federal court's construction of a federal statute (see Pet. App. A7-A8), lends substantial credence to the belief that the decision in *Porcher* is an aberration that will not be followed by other courts.

In our view, therefore, the need for Supreme Court review of the decision below is even weaker than it was in *Porcher* because fewer states will potentially be affected by

the decision. The conflict with the Fourth Circuit asserted by petitioner is not a reason to grant review; while there is technically a conflict, it does not engender the sort of practical effects that ordinarily make a conflict between a court of appeals and the highest court of a state an important consideration in deciding whether to grant certiorari. The treatment of voluntary departures for unemployment compensation purposes is not a matter on which uniformity has been required or even encouraged by Congress. The fact that permitting the conflict to stand will result in disparate treatment of pregnancy-related disabilities in Missouri and South Carolina is not a cause for concern; regardless of whether the issue presented here is ultimately resolved by this Court, there will be considerable disparity of treatment on this point among the several states.

All the conflict means as a practical matter is that it can be said with some assurance that one of the decisions is wrong and therefore that one of the parties in either *Porcher* or this case has wrongfully been denied relief. But the existence of an erroneous decision is not a sufficient reason for this Court to exercise its certiorari jurisdiction. In our view, it is *Porcher* that was erroneously decided. It is true that, if this Court does not address this issue, it is likely that South Carolina will be required to continue to pay some unemployment benefits under the compulsion of an erroneous interpretation of FUTA that it might not otherwise choose to pay. That effect on South Carolina (and perhaps West Virginia) was not deemed a sufficient reason to grant certiorari in *Porcher* (where there was also a substantial judgment against the state involved), and it is not sufficient reason to grant certiorari here. By the same token, assuming arguendo that petitioner's interpretation of FUTA is correct, the consequence of the Court's failure to grant review will simply be that a class of persons in Missouri will be denied unemployment benefits to which they

are entitled. Such an erroneous result similarly would not be sufficient grounds for this Court to grant review. Because of the very small number of jurisdictions affected by the issue presented in this case, the issue simply is not important enough for this Court to grant certiorari, particularly in a case where the issue has been resolved correctly by the lower court.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986

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[1]As petitioner suggests (Pet. 15), it is difficult to determine whether some states have chosen to eliminate disqualifications for pregnancy-related disabilities because of the decision in *Porcher*. But even if that were so, that does not mean that in those states "benefits are being paid to claimants who are not truly eligible under the law" (see Pet. 15). Even though FUTA does not require states to grant preferential treatment to pregnancy-related disabilities, the statute does not bar states from doing so. Thus, those persons receiving benefits are fully "eligible under the law" (*ibid.*). The fact that a state not bound by Fourth Circuit law has eliminated disqualification for voluntary separations due to pregnancy reflects one of two things: (1) either the state approves of that approach as a matter of policy; (2) or the state believes that the issue is not significant enough to warrant litigation. In either event, the fact that almost every state has adopted a policy that eliminates the need to resolve the issue presented in this case weighs heavily against granting certiorari here.

JOINT

APPENDIX

(5)

No. 85-129

In the Supreme Court of the United States

October Term, 1985

LINDA WIMBERLY,
Petitioner,
vs.
THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

JOINT APPENDIX

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Petition for Certiorari Filed July 23, 1985
Certiorari Granted April 21, 1986

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No. 85-129

In the Supreme Court of the United States

October Term, 1985

LINDA WIMBERLY,
Petitioner,

vs.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Date of Action	*Description of Action*
8–5–81	Petition Filed (Date Entered 8–5–81) (Entered by M.C.L.)
8–5–81	Assigned to Civil Docket (Date Entered 8–5–81) (Entered by DRW)
8–5–81	Certificate of Mailing of Pet for Review of Decision of Ind Commission of Mo. (Date Entered 8–13–81) (Entered by MH)
9–3–81	Joint Answer of Resp Labor and Ind Relations Commission of Mo. and Mo. Division of Empl. Sec. (Date Entered 9–4–81) (Entered by MH)
1–27–82	Memorandum of Petitioner in Support of Petition for Judicial Review of Decision of Labor and Indust. Relations Commission of Mo. (Date Entered 1-29-82) (Entered by PAT)
2–5–82	Petitioner's Attorneys Notice of Change of Address (Date Entered 2–8–82) (Entered by JH)
2–26–82	Memorandum of Respondents, Labor and Industrial Relations Commission of Missouri and Missouri Division of Employment Security (Date Entered 3–1–82) (Entered by PR)
3–10–82	Pet's Reply to Memorandum of Resp's Labor and Industrial Commission of Missouri and Missouri Div of Employment Security (Date Entered 3–11–82) (Entered by PR)

Date of Action	*Description of Action*
12/31/82	Case Removed From Civil Docket E and Is Retained in Division 15
04/27/83	Judgment Entry

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Filing Date	*Filing Attorney*	*Event*
05–27–83		Notice of Appeal Filed in Circuit Court
05–27–83	24632	Ms Sharon Ann Willis Appeared for Defendant/Appellant
05–27–83	22128	Rick V Morris (P. O. Box 59 Jefferson City Mo 65104) Appeared for Defendant/Appellant
05–27–83	28341	Julie E Sacks Levin Appeared for Plaintiff/Respondent
05–27–83	27827	Timothy P Duggan Appeared for Defendant/Appellant
06–02–83		Notice of Appeal Filed in Appellate Court
08–01–83		Record on Appeal Filed
08–01–83		****Legal File Only****
08–04–83		*Transcript of Proceedings-Filed
09–23–83	27827	Appellant Brief Filed
09–23–83		*Appellants Briefs Filed Jointly by Appellants

Filing Date	*Filing Attorney*	*Event*
10–19–83	28341	Respondent Brief Filed
02–08–84		Case Docketed
02–08–84		* Division I–Pritchard, Manford & Nugent
03–29–84		Case Submitted
04–17–84		Part Affirmed/Part Modified (Signed Majority Opinion) by Judge Donald L. Manford
04–17–84		Affirmed (Concurring Opinion) by Judge Anthony P. Nugent Jr.
04–17–84		*Opinion Affirmed As Modified*
05–01–84	27827	Motion for Rehearing and (or) Transfer to Supreme Court [Overruled and Denied 05–29–84] (Suggestions in Opposition Filed by 28341 on 05–07–84) (Suggestions in Support Filed by 27827 on 05–01–84)
05–01–84		*Motion & Suggs Filed Jointly by Appellants*
05–29–84		Opinion Sent to Publisher
06–14–84	24632	Application for Transfer to Supreme Court Filed in Supreme C [Sust 7-17-84]
06–14–84		Current Case Status Is Post Opinion Motion in Supreme Court
7–18–84		Case Trsfd. to Sup. Ct. by Mandate

SUPREME COURT OF MISSOURI
EN BANC

Date of Action	
06–12–84	Appellants' application to transfer from MO C/A,WD, filed w/notice
06–21–84	Respondent's suggestions in opposition filed, w/service.
07–17–84	Apps.' application to transfer from the MO C/A,WD, sustained and cause ordered transferred. Mandate sent to Clerk of said court; copies sent to attys. of record.
07–31–84	Clerk, Mo. C/A, WD, files all files herein, incl. notice of appeal, record on appeal (legal file only), appellant and respondent briefs, transcript of proceedings before Labor & Industrial Relations Comm. pursuant to order of this Court of July 17, 1984
08–06–84	Appellants' brief filed, w/service.
08–09–84	Respondent's motion for extension of time to file brief filed, w/service. Motion sustained and time extended to Sept. 7, 1984.
09–04–84	Resp.'s additional brief filed, w/service.
01–18–85	Argued and submitted
04–02–85	REVERSED OPINION BY WELLIVER, J., Higgins, J., concurs; Rendlen, C.J., concurs in result; Donnelly, J., concurs in result in separate opinion filed; Blackmar, J., dissents in separate opinion filed; Billings and Gunn,

Date of Action	
	JJ., dissent and concur in separate dissenting opinion of Blackmar, J.
04–16–85	Respondent's motion for rehearing filed, with suggestions, and service.
04–22–85	Appellant's suggestions in opposition filed.
04–30–85	Resp.'s motion for rehearing overruled. Donnelly, J., files revised opinion concurring in result.
05–02–85	Mandate and certified copy of opinion mailed to Department of Judicial Records of Jackson County.
04–24–86	Clerk of the U. S. Supreme Court files that court's mandate granting petition for writ of certiorari.

PETITIONER'S PETITION FOR REVIEW FILED AUGUST 5, 1981

IN THE CIRCUIT COURT OF MISSOURI
SIXTEENTH JUDICIAL CIRCUIT

Case No. CV81-16713

Civil Docket E

LINDA L. WIMBERLY
700 Sioux Avenue
Independence, Missouri 64056,

Petitioner,

v.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI
(Serve: John R. Igoe)
1904 Missouri Boulevard
Jefferson City, Missouri 65102,

AND

THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI
1411 Main Street
Kansas City, Missouri 64105

AND

J. C. PENNEY CO., INC.
4200 Blue Ridge Mall
Kansas City, Missouri 64133

Respondents.

PETITION FOR REVIEW OF DECISION OF LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI

Comes now petitioner Linda Wimberly and for her Petition for Review of Decision of Labor and Industrial Relations Commission of Missouri states and alleges as follows:

1. Petitioner Linda Wimberly is, and at all times relevant to this action was, a citizen and resident of Jackson County, Missouri.

2. Respondent Labor and Industrial Relations Commission of Missouri (hereinafter referred to as the "Industrial Commission") is charged by law with the exercise and execution of Chapter 288 of the Revised Statutes of Missouri commonly referred to as the Missouri Employment Security Law.

3. Respondent Division of Employment Security of the State of Missouri is responsible for administering the unemployment insurance for the state of Missouri pursuant to §288.220 of the Revised Statutes of Missouri.

4. Respondent J. C. Penney Co. Inc. is a corporation doing business in the state of Missouri.

5. Jurisdiction exists in this Court pursuant to §288.210 R.S.Mo.

6. On or about January 6, 1981, petitioner Linda Wimberly was denied her claim, as employee, against respondent, J. C. Penney Co. Inc., as employer, for unemployment compensation benefits after the determination of her claim by a deputy of respondent Division of Employment Security of Missouri. The deputy found that petitioner, Linda Wimberly, left her work voluntarily on August 23,

1980, without good cause attributable to her work or to her employer. The deputy of respondent Division of Employment Security found that petitioner, Linda Wimberly, was disqualified from receiving unemployment compensation benefits until she has earned wages after August 23, 1980, equal to ten times her weekly benefit amount.

7. Petitioner, Linda Wimberly, filed a timely appeal of the deputy's decision on January 9, 1981.

8. On or about April 24, 1981, respondent, Division of Employment Security of Missouri Appeals Tribunal, (hereinafter referred to as the "Appeals Tribunal"), affirmed the deputy's denial of petitioner Linda Wimberly's claim for unemployment compensation benefits. The decision of the Appeals Tribunal can be found in the Division of Employment Security records of appeal No. A-758-81.

9. On April 29, 1981, petitioner, Linda Wimberly, filed a timely application for review of the decision of the Appeals Tribunal to the respondent, Industrial Commission.

10. On July 17, 1981, respondent, Industrial Commission, entered an order in the matter of petitioner Linda Wimberly's claim as employee, against respondent J. C. Penney Co. Inc., as employer, under Commission No. LC-1591-81, Appeal No. A-758-81. In said order of the Industrial Commission, petitioner's Application for Review was denied. This decision of the Industrial Commission thereby affirmed the decision of the Appeals Tribunal of respondent Division of Employment Security which stated that petitioner, Linda Wimberly, left her work voluntarily on August 23, 1980, without good cause attributable to her work or to her employer.

11. Petitioner, Linda Wimberly, did not voluntarily leave her employment with respondent J. C. Penney Co. Inc. Rather, petitioner, Linda Wimberly, asked respondent, J. C. Penney Co. Inc. for and was granted a maternity leave beginning August 23, 1980 until she was able to return to work after the birth of her child.

12. Said order of respondent, Industrial Commission, and said decision of the Appeals Tribunal are erroneous in that:

(a) Petitioner did not leave her work voluntarily without good cause, but was in fact terminated by her employer, as the weight of the evidence supports.

(b) The decision of the Appeals Tribunal and Industrial Commission is not based upon substantial and competent evidence, but rather upon innuendo, hearsay, other incompetent and insubstantial evidence, and a misstatement of the facts.

(c) The Appeals Tribunal and Industrial Commission misapplied the facts of petitioner Linda Wimberly's claim to the law.

(d) The decision of the Appeals Tribunal and Industrial Commission was based on an erroneous conclusion of the law.

13. The decision of the Appeals Tribunal and Industrial Commission was violative of petitioner Linda Wimberly's equal protection rights under the Fourteenth Amendment to the United States Constitution and Article 1 §2 of the Missouri Constitution in that it differentiates in its treatment of persons who take a maternity leave and persons who take a leave of absence from their employment.

WHEREFORE, petitioner prays that respondent Industrial Commission certify to this Court all of the proceedings, documents and papers in this cause, including the transcript of all testimony taken therein and the Commission's order; that this Court review the same as to the facts and the law; and that said action of respondent Commission be reversed and set aside.

/s/ Julie Levin
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Telephone: (816) 221-3776
Attorney for Petitioner

(Certificate of Mailing Omitted in Printing)

RESPONDENTS' ANSWER FILED SEPTEMBER 3, 1981

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Case No. CV 81-16713

Civil E

LINDA WIMBERLY,
Petitioner,

v.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI, et al.,
Respondents.

JOINT ANSWER OF RESPONDENTS LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI AND MISSOURI DIVISION OF EMPLOYMENT SECURITY

Comes now Respondents, the Labor and Industrial Relations Commission of Missouri and Missouri Division of Employment Security, and for their joint answer to Petition for Review state that they:

1. Admit the averments contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Petition for Review;

2. Deny the averments contained in paragraph 11 of Petition for Review;

3. Deny the averments contained in paragraph 12 and all sub-paragraphs thereunder of Petitioner's Petition for Review;

4. Deny the averments contained in paragraph 13 of Petition for Review;

5. Deny each and every averment contained in or inferred by Petitioner's Petition for Review except as specifically admitted hereinabove;

6. Further state that the findings of the Commission as to the facts are supported by competent and substantial evidence, and therefore, are conclusive, and that based upon the whole record, the Labor and Industrial Relations Commission reasonably could have made its findings and reached its results. Article V, Section 22, Mo. Const. 1945, Section 288.210 RSMo 1978; *Union-May-Stern v. Industrial Commission of Missouri,* (K.C.C.A. 1954) 273 S.W.2d 766, 768.

WHEREFORE, having fully answered, the Respondents, Labor and Industrial Relations Commission of Missouri and the Missouri Division of Employment Security, pray this Court affirm the decision of the Labor and Industrial Relations Commission of Missouri and dismiss the Respondents with their costs.

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PETITIONER'S

BRIEF

No. 85-129

In the Supreme Court of the United States

OCTOBER TERM, 1985

LINDA WIMBERLY,
Petitioner,

vs.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF FOR PETITIONER

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52pp

QUESTION PRESENTED*

The State of Missouri denies unemployment compensation benefits to women who leave their jobs due to pregnancy and are denied reinstatement in those jobs even though they are available for work and able to return to work. Does this denial violate 26 U.S.C. § 3304(a)(12) which provides that "[n]o person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy"?

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*All parties to the proceeding in the Missouri Supreme Court are listed in the caption.

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No. 85-129

In the Supreme Court of the United States

OCTOBER TERM, 1985

LINDA WIMBERLY,
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THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF FOR PETITIONER

OPINIONS BELOW

The initial decision of the Missouri Supreme Court is dated April 2, 1985 and is not officially reported. It is printed in Pet. App. A1-A20. The decision of the Missouri Supreme Court denying petitioner Linda Wimberly's Motion for Rehearing is dated April 30, 1985, and

is identical to the initial decision of April 2, 1985, with the exception of a modified concurring opinion by Justice Robert T. Donnelly. This decision is officially reported at 688 S.W.2d 344 (Mo. 1985) and is printed in Pet. App. A21-A23.[1] The Missouri Supreme Court decision reversed the judgment of the Missouri Court of Appeals, Western District, which is printed in Pet. App. A23-A40 and was not officially reported.

The opinion of the Circuit Court of Jackson County, Missouri, is printed in Pet. App. A40-A45 The decision of the Labor and Industrial Relations Commission of Missouri is printed in Pet. App. A46-A47. The decision of the Appeals Tribunal for the Division of Employment Security of Missouri is printed in Pet. App. A48-A50. The determination of the Deputy for the Division of Employment Security of Missouri is printed in Pet. App. A51-A53.

JURISDICTION

The judgment of the Missouri Supreme Court reversing the Missouri Court of Appeals, Western District, was entered on April 2, 1985. The judgment of the Missouri Supreme Court overruling petitioner's Motion for Rehearing was entered on April 30, 1985. The petition for writ of certiorari was filed on July 23, 1985, and granted on April 21, 1986. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

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1. The portions of the opinion which are duplicative of the April 2, 1985, opinion are not reprinted. The only pages that are reprinted are those that were modified in the April 30, 1985, order. Also included in Pet. App. A21 is the letter from the Clerk of the Missouri Supreme Court which contains the official notice of the Court's order denying Petitioner's Motion for Rehearing.

STATUTES INVOLVED

26 U.S.C. § 3304(a)(12)

(a) Requirements—The Secretary of Labor shall approve any state law submitted to him, within 30 days of submission, which he finds provides that—

* * *

(12) No person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy. * * *

Mo. Rev. Stat. § 288.050.1(1)

1. Notwithstanding the other provisions of this law, a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages for work insured under the unemployment compensation laws of any state equal to ten times his weekly benefit amount if the deputy finds:

(1) That he has left his work voluntarily without good cause attributable to his work or to his employer; * * *

STATEMENT OF THE CASE

Petitioner, Linda Wimberly, was employed by J.C. Penney Co., Inc. as a cashier. (Pet. App. A48). On August 23, 1980, Mrs. Wimberly, then seven months pregnant, requested and was granted a maternity leave of absence. (Pet. App. A49). The leave of absence policy of J.C. Penney Co., Inc. did not guarantee the reinstatement of an employee in the event that no positions were

available when the employee was able to return to work. (Pet. App. A49).

On December 1, 1980, less than one month after her child was born, Mrs. Wimberly notified her employer that she was able to return to work. (Pet. App. A49). At that time she was advised that no positions were available. (Pet. App. A49). On December 7, 1980, Mrs. Wimberly filed a claim for unemployment compensation benefits for the period beginning December 1, 1980. (Pet. App. A51). A deputy for respondent Division of Employment Security denied the claim of Mrs. Wimberly on the ground that she had "quit because of pregnancy" (Pet. App. A53), and, therefore, pursuant to Mo. Rev. Stat. § 288.050.1(1), had voluntarily left her work without good cause attributable to her work or to her employer.

Mrs. Wimberly appealed the Deputy's Determination to the Appeals Referee, and an evidentiary hearing was held. At the hearing, Mrs. Wimberly maintained that pursuant to 26 U.S.C. § 3304(a)(12) (1982)[2] and *Brown v. Porcher*, 502 F. Supp. 946 (D.S.C. 1980), *aff'd as modified*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983), a state is prohibited from denying unemployment compensation benefits to women who have left their jobs due to pregnancy and are denied reinstatement in those jobs when they are able to return to work. (Tr. 39-40). The Appeals Referee affirmed the Deputy's Determination (Pet. App. A50), and review by the respondent Labor and Industrial Relations Commission of Missouri was denied. (Pet. App. A46).

Mrs. Wimberly filed a Petition for Review of the administrative decision in the Circuit Court of Jackson

2. 90 Stat. 2667, 2679 (1976).

County, Missouri. (J.A. 7-11). The Circuit Court held that the decision of the Appeals Referee must be reversed in accordance with 26 U.S.C. § 3304(a)(12) and *Brown v. Porcher*. (Pet. App. A44-A45).

Respondents Division of Employment Security and the Labor and Industrial Relations Commission[3] appealed the decision of the Circuit Court of Jackson County, Missouri, to the Missouri Court of Appeals, Western District. In affirming the Circuit Court decision, the Missouri Court of Appeals held that Mo. Rev. Stat. § 288.050.1(1) must be "construed and applied in conformity with the interpretation and construction applied to § 3304(a)(12) under *Brown* in all cases involving female employees who are otherwise eligible for unemployment compensation benefits but who leave their employment for reasons related to pregnancy." (Pet. App. A38).[4]

The Missouri Supreme Court agreed to review the decision of the Missouri Court of Appeals on the Commission's motion to transfer. In a 4-3 decision, the Missouri Supreme Court found that the Fourth Circuit Court of Appeals had erred in its interpretation of 26 U.S.C. § 3304(a)(12) and reversed the decision of the Missouri Court of Appeals. (Pet. App. A13). Recognizing that its decision was in direct conflict with the Fourth Circuit Court of Appeals, the Court declared that it would not "on the basis of the single Court's questionable construction of a federal statute" (Pet. App. A12), disavow a

3. Respondents Division of Employment Security and the Labor and Industrial Relations Commission will be hereinafter referred to collectively as the "Commission."

4. The Court of Appeals also modified the Circuit Court decision, limiting the recoverable benefits to the period of time in which an employee was "able and available to return to work but was denied reinstatement in her employment due to the unavailability of any job or work." (Pet. App. A39-A40).

substantial body of Missouri case law which treats pregnancy and illness as voluntary. Although four of the justices agreed to the result, there was considerable disagreement in the rationale. The main opinion was fully endorsed by two justices. One other justice concurred without opinion. The fourth, Justice Robert T. Donnelly, wrote a separate concurring opinion which was slightly revised in the denial of the Motion for Rehearing.[5] A fifth justice, Charles B. Blackmar, filed a separate dissenting opinion in which the remaining two justices concurred. In his dissent, Justice Blackmar stated that by enacting 26 U.S.C. § 3304(a)(12), Congress clearly intended to prohibit the disqualification of women in Mrs. Wimberly's situation. (Pet. App. A16). Additionally, Justice Blackmar maintained that pregnancy could not be construed as a voluntary act in order to deny benefits to otherwise eligible women. (Pet. App. A19). Mrs. Wimberly filed a Motion for Rehearing in the Missouri Supreme Court which was denied. (Pet. App. A21).

SUMMARY OF ARGUMENT

Congress enacted section 3304(a)(12) in order to eradicate all unemployment compensation disqualifica-

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5. Justice Donnelly's concurring opinion is indicative of the confusion and disagreement regarding the Missouri Supreme Court decision. The central thesis of Justice Donnelly's concurring opinion can be summarized in his words:

> [a]lthough we may be bound to follow the United States Supreme Court's decision concerning federal statutes as involving uniquely federal questions, *see Urie v. Thompson*, 337 U.S. 163, 174 (1949), in my view we are not so bound as to its pronouncements regarding the United States Constitution. (Pet. App. A14).

This expression represents not only a rather unique view of the relationship between the federal and state courts, but it is also irrelevant in the *Wimberly* case which involves neither a United States Supreme Court decision nor a constitutional issue.

tions of otherwise eligible women who left their jobs because of pregnancy. At the time section 3304(a)(12) was enacted, two main pregnancy-related disqualifications existed in state unemployment compensation systems. These disqualifications were: 1. conclusive presumptions that a woman is unable to work or unavailable for work during certain stages of her pregnancy and 2. the disqualification of a woman because she left her work due to pregnancy or because her unemployment was a result of her pregnancy. H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 7 (1975). The language and legislative history of section 3304(a)(12), as well as the general remedial purpose of the Federal Unemployment Tax Act, support the conclusion that section 3304(a)(12) was intended to prohibit both these disqualifications.

The language of section 3304(a)(12) is clear and unambiguous. Nevertheless, the Missouri Supreme Court and the Commission maintain that the use of the word "solely" in this section causes it to be an antidiscrimination provision that merely prohibits the treatment of pregnancy differently from disability. The word "solely" is used to specify that a state cannot deny compensation to an otherwise eligible woman for the exclusive reason that she left her job because of pregnancy. Despite the fact that Linda Wimberly was otherwise eligible for benefits, she was denied unemployment compensation exclusively because her separation from work was due to pregnancy. Her case fits the precise language of the statute.

The legislative history surrounding section 3304(a)(12) contains several references which establish that Congress was concerned about unfair disqualifications for otherwise eligible women who are separated from their

jobs because of pregnancy. Nothing in the legislative history indicates that Congress only intended to enact an antidiscrimination provision that mandated similar treatment for pregnant and disabled persons. Rather Congress' focus was on a claimant's availability for work and ability to work. If a claimant is able to work and available for work, she is eligible for benefits under section 3304(a)(12) regardless of whether she left her job because of pregnancy. H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 50 (1975).

The Fourth Circuit Court of Appeals in *Brown v. Porcher* was correct in its analysis of section 3304(a)(12). In a well-reasoned opinion, that court found that by enacting this section, Congress imposed a "sweeping ban" on pregnancy-related disqualifications of otherwise eligible women. 502 F. Supp. 946, 955 (D.S.C. 1980), *aff'd as modified,* 660 F.2d 1001 (4th Cir. 1981).

The Missouri Supreme Court and the Commission have suggested that the United States Department of Labor interprets section 3304(a)(12) as only prohibiting laws which create a special category for pregnancy-related claims. However, this is not correct. The Department of Labor has consistently supported the provision of benefits to unemployed pregnant women and formerly pregnant women as long as they are able to work and available for work. Additionally, the act of certification of Missouri by the Department of Labor as complying with federal minimum requirements does not signify that Missouri is complying with section 3304(a)(12). Such certification does not reflect a review of the actual policy of Missouri regarding pregnancy-related separations. Rather, the certification merely indicates that the statutes of Missouri, on their face, do not violate the section.

At the time section 3304(a)(12) was enacted, Congress was aware that more women of child-bearing age were entering the work force. Congress knew that these women would suffer a tremendous financial hardship if they were denied reinstatement in their jobs after pregnancy and were also denied unemployment compensation while actively seeking new jobs. Congress recognized the critical needs of these women and their families by enacting section 3304(a)(12).

ARGUMENT

I.

Congress Intended 26 U.S.C. § 3304(a)(12) to Prohibit the Disqualification From Receipt of Unemployment Benefits of Otherwise Eligible Women Who Leave Their Jobs Due to Pregnancy and Are Denied Reinstatement in Those Jobs When They Are Able to Return to Work.

The original Federal Act governing the unemployment insurance system[6] was adopted in 1935, during the Great Depression. Since its inception, the unemployment insurance system has stood as a "first line of defense," protecting workers and their families from the economic ravages of unemployment. *California Department of Hu-*

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6. The initial unemployment insurance provisions were enacted under Title IX of the Social Security Act of 1935 Ch. 9, Pub.L. No. 74-271 §§ 301-303, 49 Stat. 620, 626-27 (1935). The same provisions were assimilated into the 1939 Internal Revenue Code as the Federal Unemployment Tax Act, Ch. 23, §§ 3301-3308, 68A Stat. 439-54 (1954). This Federal Act is currently part of the Internal Revenue Code, 26 U.S.C. §§ 3301-3311 (1982).

man Resources v. Java, 402 U.S. 121, 131 (1971). It was also intended to protect and stabilize the economy in times of decline by maintaining consumer purchasing power, spurring sales and preventing other industries from spiraling downward. *Id.* at 131-133.

The funds necessary to support the unemployment insurance system come from two sources. The bulk of the money is collected from payments made in lieu of wages by employers. Benefit checks for the unemployed are drawn from the resulting trust fund. Administrative costs are paid by the federal government through operating grants which are paid to state unemployment insurance commissions. *Brown v. Porcher,* 502 F. Supp. 946, 947 (D.S.C. 1980).

Generally, the operation of an unemployment compensation program is a matter of state law. At times, however, Congress has responded to certain national concerns by imposing explicit conditions on receipt of federal operating grants by the states. *See New York Tel. Co. v. New York Labor Department,* 440 U.S. 519, 538 (1979). These explicit conditions are considered "fundamental" standards, and they apply to all states. *See Steward Machine Co. v. Davis,* 301 U.S. 548, 594 (1937). These standards are set out at 26 U.S.C. §§ 3301-3311 (1982 & Supp. I 1983 & Supp. II 1984) and 42 U.S.C. §§ 501-505 (1982 & Supp. I 1983 & Supp. II 1984). One such fundamental standard can be found in the statute in question, 26 U.S.C. § 3304(a)(12) (1982).

In 1975, Congress became increasingly aware of various problems faced by pregnant women and new mothers in obtaining unemployment insurance benefits. After Congress thoroughly investigated the extent of these problems, Congress enacted section 3304(a)(12). This statute

was intended to be a broad comprehensive mandate to eradicate all pregnancy-related disqualifications in the nation's unemployment insurance system. It was intended to facilitate the reentry of women into the work force after pregnancy and to enable them to be effective participants in the economy. *Brown v. Porcher,* 502 F. Supp. 946, 956 (D.S.C. 1980). This statute was of particular importance to lower paid and less skilled workers who typically did not receive the same job protections and benefits as higher paid, better skilled workers.

As in all other states, Missouri workers insured under the unemployment compensation system are eligible for payments only if they are able to work, available for work and actively looking for a job. Mo. Rev. Stat. § 288.040 (Supp. 1986). Whether an eligible claimant will receive payments depends upon the circumstances surrounding his or her unemployment. Disqualifications or penalties are imposed on otherwise eligible claimants who have engaged in disapproved behavior. For example, one who voluntarily quits his or her employment without good cause attributable to the work or employer will be disqualified for benefits pursuant to Mo. Rev. Stat. § 288.050.1 (1) (Supp. 1986).

Unlike most states, it is the general policy of the state of Missouri and the Commission to disqualify any woman for unemployment compensation if she has left her job due to pregnancy regardless of whether she is able to work and available for work. This policy treats a pregnancy-related separation from work as a voluntary quit. Such a policy violates 26 U.S.C. § 3304(a)(12) which provides in part that "[n]o person shall be denied compensation under such state law solely on the basis of pregnancy or termination of pregnancy . . . ."

A. The Language of 26 U.S.C. § 3304(a)(12) Establishes Congress' Intent to Prohibit the Disqualification From Receipt of Unemployment Compensation of Women in Linda Wimberly's Situation.

In any case involving statutory construction the "starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *See also Consumer Product Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108 (1980). The analysis by the Missouri Supreme Court and the Commission regarding the interpretation of section 3304(a)(12) has been directed at the effect of the word "solely." *See* Pet. App. A10 and Commission's Brief in Opposition to Petition for Writ of Certiorari, p. 9 (hereinafter referred to as "Commission's Brief"). Statutory words should be given their plain and ordinary meaning. *Hanover Bank v. Commissioner,* 369 U.S. 672, 687 (1962); *see also Maine v. Thiboutot,* 448 U.S. 1, 6 (1980) and *T.V.A. v. Hill,* 437 U.S. 153, 173 (1978). The word "solely" is typically defined as meaning "to the exclusion of all else." *E.g.,* Webster's New Collegiate Dictionary 1097 (8th ed. 1980). Linda Wimberly stopped working solely because of her pregnancy. Pregnancy was the exclusive reason for stopping work. Mrs. Wimberly was denied unemployment compensation, and the exclusive reason for that denial was that she had previously stopped work because of her pregnancy. *See* Deputy's Determination. (Pet. App. A53). Therefore, despite the fact that Mrs. Wimberly was able to work and available to return to work, she was denied benefits "solely on the basis of pregnancy or termination of pregnancy." Her case fits the precise language of the federal statute.

The Commission claims that it did not deny benefits to Mrs. Wimberly solely because she left her job due to

pregnancy. It argues that Mrs. Wimberly was denied benefits because under its interpretation of Missouri law, she *voluntarily quit* her job without good cause attributable to her work or her employer. (Commission's Brief p. 9). Such a position allows the Commission and the State of Missouri to deny benefits on the basis of an asserted "legitimate" reason when in actuality they are defying the express mandate of section 3304(a)(12). According to this interpretation the overwhelming majority of pregnancy-related separations would be treated as voluntary quits. By asserting this position, Missouri is creating a distortion of the statute that surely was not intended by Congress.

There are situations in which a state can legitimately deny benefits to a pregnant woman without violating the dictates of section 3304(a)(12). For example, if a pregnant woman leaves her job and has no intention of returning to work, she is not available for work and would not be eligible for benefits. Because she has chosen not to continue in the work force, she would properly be denied benefits. This denial would be based on her unavailability for work and not based *solely* on her pregnancy. Similarly, a pregnant woman who leaves her job in order to move to a different city with her husband has not left her job because of pregnancy. A denial of benefits under such circumstances would not be based on her pregnancy but rather on her choice to voluntarily leave her job to move elsewhere.

In the instant case, the only reason that Mrs. Wimberly left her job was so that she could give birth to her baby. She worked until she was physically unable to continue. (Pet. App. A49). Mrs. Wimberly did everything she could to retain her job and to be reinstated when she

was able to return to work. (Tr. 13-14). Her employer, however, would not guarantee reinstatement. (Pet. App. A49). Mrs. Wimberly discovered that she would not be reinstated when she notified her employer that she could return to work. (Pet. App. A49). At the time Mrs. Wimberly was denied reinstatement, she became eligible for benefits. She left her work *solely* because of her pregnancy and was subsequently denied benefits *solely* because of her pregnancy.

The Missouri Supreme Court interpreted section 3304 (a)(12) as an antidiscrimination provision and held that the denial of benefits to Mrs. Wimberly did not constitute discrimination.[7] It concluded that there was no discrimination because she was disqualified on the same grounds as are others with medical conditions unrelated to their employment. (Pet. App. A10-A12).

If Congress had intended section 3304(a)(12) to be an antidiscrimination provision, it would have used more explicit language. Typically, when Congress has intended

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7. Other explanations of section 3304(a)(12) have been offered: (1) The Missouri Supreme Court indicated that section 3304(a)(12) does not apply when a pregnant woman takes a leave of absence without a guarantee of reinstatement. (Pet. App. A4; A12); and (2). The Commission has suggested that section 3304(a)(12) only serves to prohibit statutory conclusive presumptions concerning the ability to work and availability for work of pregnant women and new mothers. (Commission's Brief p. 10).

There is no limiting language in section 3304(a)(12) that would justify either of these interpretations. Under the first explanation, if a person is not guaranteed reinstatement, then her absence from the job is treated as a "voluntary quit." Central to this position is the idea that determinations of disqualifications vary depending on the employer maternity leave policies. But the language of section 3304(a)(12) makes no reference to maternity leave policies and the legislative record is void of any evidence of such an intent. If Congress had intended to permit a state to distinguish between pregnancy-related separations by scrutinizing the type of maternity leave obtained by

(Continued on following page)

to prohibit discrimination, it has used the word "discriminate" or a derivative of that term directly in the statute. *See e.g.* 42 U.S.C. § 290dd-2(a) (Supp. II 1984); 11 U.S.C. § 366(a) (Supp. II 1984); 11 U.S.C. § 525(a) (Supp. II 1984); 12 U.S.C. § 215(f) (1982); 29 U.S.C. § 794 (1982); 38 U.S.C. § 4133 (1982); 42 U.S.C. § 274b(b)(1)(C) (Supp. II 1984); and 42 U.S.C. § 290ee-2(a) (Supp. II 1984).

The most striking example of Congress' ability to limit a law to prohibit discrimination in the manner suggested by the Missouri Supreme Court is the Pregnancy Discrimination Act of 1978. The word "discriminate" (or a derivative) is used numerous times in the text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. I 1983 & Supp. II 1984), as well as in the title of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982). In this section, Congress elaborated on the meaning of discrimination on the basis of pregnancy by providing:

Footnote continued—

a claimant, it would have referred to maternity leaves in the statute. Such an interpretation is illogical since Congress certainly would not have intended that the act and whim of an employer could determine whether a woman was eligible for benefits.

In fact, under this interpretation, if a pregnant woman was not guaranteed reinstatement, she would be placed in the position of prolonging her departure from work with the hope that her employer would terminate her before she was forced to leave on her own. If she were terminated, she would be qualified for benefits. If she left on her own accord, she would be disqualified. Congress did not sanction this type of distinction.

Regarding the second explanation which is offered by the Commission, nothing in section 3304(a)(12) indicates that Congress was only concerned with banning conclusive presumptions relating to pregnancy. Had Congress merely intended a limited ban on conclusive presumptions, it could have stated, "no person shall be presumed to be unable to work or unavailable for work because of pregnancy" or "no person shall be presumed to be ineligible for unemployment compensation because of pregnancy."

> . . . women affected by pregnancy, childbirth, or related medical conditions shall be *treated the same . . . as other persons not so affected* but similar in their ability or inability to work. . . . (Emphasis added).

If Congress had intended section 3304(a)(12) to be an antidiscrimination provision which would allow states to deny benefits to women for pregnancy-related separations as long as persons with all other medical conditions were treated similarly, it could have been more explicit. It could have used the word "discriminate" or at least stated as it did in the Pregnancy Discrimination Act that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same as all persons with other medical conditions in determinations of eligibility for compensation."

Thus, if Congress had wanted to impose an antidiscrimination restriction on section 3304(a)(12), it could and would have plainly said so. Congress uses appropriately restrictive language when it intends to limit the scope of a law. *See In re Nissen's Estate*, 345 F.2d 230, 235 (4th Cir. 1965). In fact, as discussed below regarding legislative history, Congress initially considered restricting the statute to prohibit discrimination by using the term "discriminate" in the statute and later discarded it in place of broader more comprehensive language. See p. 19 of this Brief.

The Commission, grasping for straws, has seized upon the use of the word "solely" in section 3304(a)(12) to support its proposition that Congress meant only to ban *discrimination* relating to pregnancy. (Commission's Brief p. 9). But Congress has used the word "solely" in many other statutes that have no relation to discrimination. *E.g.*

15 U.S.C. § 1064(c) (Supp. II 1984); 15 U.S.C. § 3902(a)(1)(D) (1982); 15 U.S.C. § 78o-4(b)(2)(A)(iv) (1982); and 15 U.S.C. § 78q-1(b)(5)(C) (1982).

When Congress has intended the word "solely" to relate to discrimination, it has specifically referred to discrimination in the statute itself. For example, in 42 U.S.C. § 290dd-2(a) (Supp. II 1984), Congress provided that:

> . . . Alcohol abusers and alcohclics who are suffering from medical conditions shall not be *discriminated* against in admission or treatment, *solely* because of their alcohol abuse or alcoholism, by any private or public general hospital, or outpatient facility (as defined in section 1633(6)) which receives support in any form from any program supported in whole or in part by funds appropriated to any Federal department or agency. (Emphasis added).

There are countless other examples of Congress' use of the word "solely" in connection with discrimination. *See e.g.* 11 U.S.C. § 366(a) (Supp. II 1984); 11 U.S.C. § 525(a) (Supp. II 1984); 12 U.S.C. § 215(f) (1982); 29 U.S.C. § 794 (1982); 38 U.S.C. § 4133 (1982); 42 U.S.C. § 274(b)(1)(C) (Supp. II 1984) and 42 U.S.C. § 290ee-2(a) (Supp. II 1984). In each of these statutes, Congress expressly used the word "discriminate" (or a derivative of that term) along with the word "solely." The word "discriminate", however, does not appear in section 3304(a)(12).

Nothing in the words provided by Congress demonstrates a desire to narrow the scope of the law. As the District Court in *Brown* held, the language is clear and unambiguous and provides "no room for exceptions" from a general rule. 502 F. Supp. at 955. The statute states that "no person" is to be denied insurance payments be-

cause of pregnancy or its termination. It does not limit the scope of the prohibition. The statutory language does not permit some claimants to be penalized and others to escape penalty because of the manner in which people with disabilities or medical conditions may be treated under state law. The language does not allow distinctions to be made based on variations between the maternity leave policies of different employers; nor does it confine itself to prohibiting conclusive presumptions of the inability to work of pregnant women.[8]

Instead of limiting the scope of the statute, Congress broadly mandated that a state cannot deny compensation based on pregnancy. The expansive language chosen by Congress manifests its intent to bar both presumptions that "hold pregnant women unable to work" and blanket policies such as in Missouri which, in effect, "disqualify a claimant because she left work on account of her condition or because her unemployment is the result of pregnancy." H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 7 (1975). The statute clearly sought to remedy these two distinct disqualifications.

The language of section 3304(a)(12) mandates that benefits not be denied to Mrs. Wimberly. "Absent a clearly expressed legislative intention to the contrary," the language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). As the following discussion of legislative history will show, there is no clearly expressed legislative intention that section 3304 (a)(12) should be interpreted to the disadvantage of women in Mrs. Wimberly's situation.

8. See *supra* note 7 for a discussion of these interpretations.

B. The Legislative History Behind 26 U.S.C. § 3304(a)(12) Establishes the Intent of Congress to Prohibit the Disqualification From Receipt of Unemployment Compensation Benefits of Women in Mrs. Wimberly's Situation.

Because the language of the federal statute is so plain and unambiguous, an investigation into congressional intent is unnecessary. *See* 2A J. Sutherland, Statutes and Statutory Construction § 46.04 (4th ed. C. Sands 1984). However, additional evidence that section 3304(a)(12) was intended to be more than an antidiscrimination provision can be found in its legislative history.

First, the evolution of the language of section 3304 (a)(12) is significant. The original draft of the statute introduced in the 94th Congress was H.R. 8366 and its companion S. 2079. That draft contained a paragraph which provided:

> [n]o person shall be denied compensation under such State law solely on the basis of pregnancy and determinations under any provision of such State law relating to voluntary terminations of employment, availability for work, active search for work or refusal to accept work shall not be made *in a manner which discriminates on the basis of pregnancy.* H.R. 8366, 94th Cong., 1st Sess. § 8(a) (1975); S. 2079, 94th Cong., 1st Sess. § 8(a) (1975). (Emphasis added).

This first draft was an antidiscrimination provision.[9] The antidiscrimination language was deleted, however,

9. The Missouri Supreme Court misunderstood the legislative history of section 3304(a)(12). That court stated that the original draft of the statute would support Mrs. Wimberly's position. (Pet. App. A11). However, such an interpretation totally disregards the use of the term "discriminates" in the initial draft and its deletion in the final version. That action was not noted by the court.

and by the time another bipartisan bill (H.R. 10210) was ultimately adopted, the pregnancy provision had been transformed into its present language. The present version eliminates the reference to "discrimination," demonstrating legislative intent to enact broad remedial legislation more comprehensive than the antidiscrimination provision which appeared in the inital bill. "Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980).

Other legislative history and historical events surrounding section 3304(a)(12) amply display Congress' intent to prohibit all pregnancy-related disqualifications in the unemployment compensation system. During the time that Congress was considering the amendment, *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) was pending. In *Turner*, the Utah Supreme Court upheld a state statute, Utah Code Ann. § 35-4-5(h)(1) (1974), which conclusively presumed that pregnant women were unable to work and unavailable for work for twelve weeks before and six weeks after childbirth. One month after the 1976 Federal Unemployment Tax Act (hereinafter "F.U.T.A.") Amendments were introduced, the United States Supreme Court held that the Utah statute violated the substantive due process requirements of the Fourteenth Amendment.[10] The Commission has implied that section 3304(a)(12) was merely a codification of the United States Supreme Court decision in *Turner*. (Commission's Brief p. 10). This is not correct.

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10. In October, 1975, H.R. 10210 was introduced. H.R. 10210, 94th Cong., 1st Sess. (1975). In November, 1975, the United States Supreme Court decided *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

The timing of these two events is important because section 3304(a)(12) could not have been a codification of a decision which was non-existent at the time of its introduction. Because the statute was not to become effective until 1978, it is also highly unlikely that Congress intended to stay enforcement of the *Turner* decision for over a year after it was rendered. Sec. 312(c) of Pub.L. 94-566 as amended by Pub.L. 95-19, Title III § 301(b), April 12, 1977, 91 Stat. 43. Moreover, section 3304(a)(12) could not have been a mere codification of *Turner* because such a codification would be unnecessary, and Congress should not be presumed to have adopted useless or unnecessary legislation. *See Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977).

Another subsection of the same Utah provision that was struck down in *Turner*, Utah Code Ann. § 35-4-5(h)(2) (1974), denied unemployment compensation to a woman whenever it was found that her *"total or partial unemployment was due to pregnancy."* (Emphasis added). This section was not discussed in depth by the Court nor was it challenged in the *Turner* case because it was not pertinent to the plaintiff's situation. However, further analysis of the legislative history shows that Congress was fully aware of this other type of disqualification and purposefully enacted section 3304(a)(12) to achieve its elimination.

In 1975, prior to the *Turner*[11] decision, Congress undertook a survey of state laws on the subject of preg-

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11. Even before the *Turner* case, Congress was aware of pregnancy disqualifications in state employment compensation programs. In the 1960's, two presidential commissions concerned with women's issues recommended that states repeal statutory provisions that disqualified women from receipt of

(Continued on following page)

nancy and unemployment compensation in order to determine the extent and definition of the problems which women were experiencing in securing benefits. Congressional staffers found two problems and made the following report:

> Nineteen states have special disqualification provisions pertaining to pregnancy. Several of these provisions hold pregnant women unable to work and unavailable for work; *the remainder disqualify a claimant because she left work on account of her condition or because her unemployment is a result of pregnancy.*

H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 7 (1975) (Emphasis added).

This report did not confine itself to *Turner*-type disqualifications. Rather, the report specified two major categories of pregnancy-related disqualifications: 1. *Turner*-type disqualifications that conclusively presumed that a woman is unable to work or unavailable for work and 2. the disqualification of a woman simply because she left work due to pregnancy or was unemployed as a result of her pregnancy.

Footnote continued—

unemployment compensation for pregnancy-related reasons. Explicit pregnancy disqualifications during this period embodied two major stereotypes about women and motherhood: first, that women were unable to work for a period prior to and subsequent to delivery; and second, that following birth, women did not wish to work. Accordingly, these provisions commonly took the form of disqualifications for a specified period before and after pregnancy and requirements that following childbirth women again demonstrate their attachment to the work force by working minimum periods or earning minimum amounts. Dahm & Fineshriber, "Administration of the Pregnancy Standard" in *Unemployment Compensation: Studies and Research* 43 (1980) (Report of the National Commission on Unemployment Compensation).

Although the House Report did not specifically list the nineteen states at issue, an unemployment insurance program letter of the Department of Labor identified nineteen states that had varying statutory disqualifications relating to pregnancy.[12] Some states mandated a period of ineligibility after a worker returned to work or after notice of desire to return to work.[13] Other states presumed inability to work or unavailability for work.[14] It is evident that Congress was aware of and considered both types of disqualifications. It is unlikely that Congress would have enacted legislation that eradicated the unfairness in one of the disqualifications while permitting similar inequities to continue in the other type of disqualification.

Neither Missouri nor South Carolina (the state involved in *Brown*) was listed as a state that had statutory disqualifications pertaining to pregnancy. That is because

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12. "Summary of Discriminatory State Provisions Relating to Pregnancy, Domestic and Marital Obligations and Dependents' Allowances," *Unemployment Insurance Program Letter* No. 33-75, Unempl. Ins. Rep. (CCH ¶ 21,482) (1976) (hereinafter "Program Letter Summary"). The nineteen jurisdictions cited as having discriminatory pregnancy provisions were Alabama, Arkansas, Colorado, Delaware, the District of Columbia, Indiana, Kansas, Maryland, Minnesota, Montana, Nevada, New Jersey, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah and West Virginia.

13. In Colorado a claimant was ineligible after childbirth until she had worked in another job for 13 weeks. If she was the sole support of a child or an invalid spouse, however, she was ineligible for only 30 days. In Tennessee a woman was disqualified for 21 days after she was able to work. In West Virginia a woman was disqualified for 30 days after returning to work. Alabama disqualified women whose maternity leaves extended beyond ten weeks unless they gave three weeks notice of a desire to return to work. Program Letter Summary.

14. The District of Columbia, Kansas, Montana, New Jersey, Rhode Island, Utah and Texas had varying periods of presumptive disability or unavailability. Delaware, Oregon, Maryland, Nevada and Ohio presumed disability until rebutted by a statement from the woman's physician or by a ruling by the program's administrator. Program Letter Summary.

their pregnancy-related disqualifications were not based on explicit language in their respective state statutes. Rather, it is the application of broader state statutory language (i.e. "voluntary quit" provisions) that brought about the disqualifications. Other states also had pregnancy-related disqualifications that were not revealed in a state statute. After exhaustive analysis, one commentator concluded that these other states were not listed in the Department of Labor letter because their policies were not apparent from their statutes.[15] A state that has a non-statutory policy that disqualifies formerly pregnant women who are denied reinstatement in their jobs creates the same unfairness as a state that declares its disqualification boldly on the face of its statute.

Congress was concerned about the ability to work and the availability for work of pregnant and formerly pregnant claimants. The House Report, H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 50 (1975), which accompanied the bill, reflected this concern. That report indicated that despite the variations among the nineteen states in their disqualifying statutes, all were "inequitable in that they deny benefits without regard to the woman's ability to work, availability for work, or efforts to find work." *Id.* The report stated that anyone who was physically unable to work or who was unavailable for work would be disqualified from receiving unemployment benefits. *Id.* Other references in the legislative history also substantiate Congress' desire to provide benefits to women as long as eligibility criteria—ability to work, availability for work, and efforts to find work—are met. S.Rep. No.

15. *See* Note, "Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304 (a)(12) of the Federal Unemployment Tax Act", 82 Mich. L.Rev. 1925, 1948 (1984) (hereinafter "Note, Denial of Unemployment Benefits").

94-1265, 94th Cong., 2d Sess. 19-21 (1976); Committee Print of the Subcommittee on Unemployment Compensation of the Ways and Means Committee of the House of Representatives, "Information to Accompany H.R. 10210 . . .," p. 12 (1975); Committee Print, "Unemployment Compensation Amendments of 1976: Description of the Provisions of H.R. 10210 (Public Law 94-566)," Prepared by the Staffs of the Senate Committee on Finance and the House of Representatives Committee on Ways and Means 6 (1976); 122 Cong. Rec. 22516 (Rep. Abzug, July 19, 1976); 22518 (Rep. Steiger, July 19, 1976).

It would be illogical and inconsistent for Congress to require the payment of benefits to pregnant women who are able to work and available for work, while sanctioning the denial of benefits to unemployed formerly pregnant women who are also able to work and available for work, where both groups of women were unemployed through no fault of their own, solely because of their pregnancies or terminations of pregnancies. By enacting section 3304(a)(12), Congress established its intent to eradicate arbitrary penalties affecting the rights of women to work and have children.

Based on the legislative history of this statute, it appears that in determing eligibility for compensation, Congress had one main focus—whether the pregnant woman or new mother is able to work and is looking for a job. If she can work and is looking for work, she is eligible for unemployment insurance benefits and should be paid. If she is not able to work or not looking for work, she is ineligible and cannot be paid. Neither the vagaries of employer maternity leave policies, nor the state's arbitrary definition of a "voluntary quit," nor the comparative treatment by the state of persons with other medical conditions is relevant to this inquiry.

C. Congress Did Not Intend Pregnancy to Be Treated the Same As Illness.

Pregnancy is not an illness. It is a normal condition experienced by millions of healthy women. Pregnancy is sometimes associated with illness because it has some of the same characteristics such as fatigue, nausea and discomfort.

In the context of section 3304(a)(12) and unemployment compensation, pregnancy cannot be associated and identified interchangeably with illness. The manner in which a state treats illness-related separations from employment should not be considered in determinations affecting benefits for pregnant claimants or new mothers. In the absence of section 3304(a)(12), a state could conceivably treat pregnancy as it does other medical conditions. However, section 3304(a)(12) specifically addresses pregnancy and not illness. The fact that pregnancy is in some respects like an illness does not compel a determination that it must always be treated as an illness.

Congress, recognizing the problem faced by working women in obtaining unemployment insurance benefits for pregnancy-related separations, wanted to minimize the economic disadvantages caused by pregnancy. Congress specifically addressed the problem of pregnancy. Although it may have been preferable to have had legislation that prohibits disqualifications on the basis of illness-related separations as well as pregnancy-related separations, Congress did not address this issue. The process of legislating always "involves drawing lines among categories of people. . . ." *Califano v. Aznavorian,* 439 U.S. 170, 174 (1978). In section 3304(a)(12), Congress chose to focus on pregnancy. The existence of illness-related disqualifications in unemployment compensation cannot negate this fact.

D. Section 3304(a)(12) Does Not Permit a State to Treat a Pregnancy-Related Separation From Employment As a Voluntary Quit.

Pregnancy may or may not be voluntary. Many women are unable to use birth control for religious or medical reasons. Additionally, birth control is not always effective. *See Wetzel v. Liberty Mutual Ins. Co.,* 511 F.2d 199, 206 (3rd Cir. 1975), *vacated* 424 U.S. 737 (1976). Regardless of whether a woman's pregnancy is voluntary, it does not follow that her separation from work is voluntary just because she is pregnant. Rather, her separation from work is necessary in order to accommodate the pregnancy.

A woman who leaves her job in order to deliver her baby (or upon doctor's orders) has no choice. She must be away from her job for some period of time to facilitate the delivery. If she makes an effort to retain her job (*e.g.* by requesting a leave of absence), she has not left that job voluntarily in the event that she is denied reinstatement.

In the instant case, Mrs. Wimberly made every effort to retain her job. She fully intended to return to work after the delivery of her baby. The only reason that Mrs. Wimberly was unable to return to her job was that she was notified that a position was no longer available for her. This cannot be viewed as a voluntary departure from employment.

Furthermore, in the final analysis, it was the act of her employer that caused Mrs. Wimberly to be unemployed. On December 1, 1980, when she was advised that no jobs were available, her employer told her she would "have to quit." (Tr. 13). Even her employer recognized that her final separation from work came at the time she

requested reinstatement, long after she left to have her baby.

Mrs. Wimberly was laid off on December 1, 1980 when she requested reinstatement. (Pet. App. A49). Mrs. Wimberly never voluntarily left her job. The Commission cannot circumvent the intent of Congress in enacting section 3304(a)(12) by treating a pregnancy-related *involuntary* separation from work as a voluntary quit.

E. The Reasoning of the Fourth Circuit Court of Appeals in Brown v. Porcher in Interpreting Section 3304(a)(12) Is Sound.

The meaning of section 3304(a)(12) was subject to judicial scrutiny for the first time in *Brown v. Porcher*. 502 F. Supp. 946 (D.S.C. 1980), *aff'd as modified*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied, Porcher v. Brown* 459 U.S. 1150 (1983). *Brown* was a class action brought to challenge the policies and practices of the South Carolina Employment Security Commission which denied unemployment compensation to women who left their most recent jobs due to pregnancy. As in Missouri, women in South Carolina who left their jobs because of pregnancy were deemed to have voluntarily quit without good cause.[16] Plaintiffs claimed that such a practice violated 26 U.S.C. § 3304(a)(12) because it denied benefits to women who were otherwise eligible (able to work and available for work) solely on the basis of their pregnancy. 502 F. Supp. 946, 953. Like the Commission

16. The Supreme Court of South Carolina has held that the words "good cause" mean, in most cases, a cause connected with the claimant's employment. *Sherbert v. Verner*, 240 S.C. 286, 299, 125 S.E.2d 737, 744 (1962), *rev'd on other grounds*, 374 U.S. 398 (1963); *Stone Mfg. Co. v. South Carolina Employment Security Commission*, 219 S.C. 239, 247, 64 S.E.2d 644, 647 (1951).

in the instant case, defendants contended that the state did not deny compensation solely on the basis of pregnancy because it treated pregnancy like any other medical condition unrelated to employment.

In a well-reasoned decision, the District Court held that the South Carolina policy violated the federal statute. 502 F. Supp. at 958. The court found that a woman's decision to stop work must be left to the woman and her doctor, and whether her decision is due to health hazards on the job or the "biological imperatives of childbirth," her receipt of "unemployment compensation when she can return to work cannot and should not turn . . . on the whim or calculations of the employer." *Id.* at 957.

The court held that "[i]n plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse for *denying* benefits to otherwise eligible women." *Id.* at 955. The Fourth Circuit, on appeal, affirmed the District Court holding. 660 F.2d at 1007.[17]

II.

Actions of the United States Department of Labor Do Not Support the Missouri Supreme Court or the Commission's Interpretation of 26 U.S.C. § 3304(a)(12).

A. Written Memoranda of the Department of Labor Conflict With the Interpretation of the Missouri Supreme Court and the Commission.

One of the factors which the Missouri Supreme Court considered in reaching its decision was its assessment

17. The Fourth Circuit also modified the judgment with respect to the individual awards. The case was then remanded for further procedings consistent with the Circuit Court opinion.

of the United States Department of Labor interpretation of section 3304(a)(12). (Pet. App. A9). In support of its position, the Missouri Supreme Court quoted from a Department of Labor Commentary that was issued shortly after section 3304(a)(12) was enacted. The language quoted by the Missouri Supreme Court emphasized that pregnant claimants not be treated differently from other unemployed individuals. This language, however, was taken out of context. The Missouri Supreme Court's quotation significantly omits critical language that would explain what the Department of Labor meant when it referred to similar treatment of pregnant women. The critical language omitted by the Missouri Supreme Court provided that: "[a] number of State laws deny benefits for causes related to pregnancy. These provisions are inequitable in that benefits are denied regardless of whether or not the individual is able and available for work and otherwise eligible." United States Department of Labor, Employment and Training Administration Unemployment Insurance Service "Draft Language Commentary to Implement the Unemployment Compensation Amendments of 1976—Public Law 94-566" at 62. The deletion of this language is critical because the Department of Labor was primarily concerned with the availability for work and ability to work of pregnant women and new mothers. The Department of Labor interpreted section 3304(a)(12) as mandating the payment of benefits to pregnant women or formerly pregnant women if they are able to work and available for work.

The Department of Labor has been consistent in its pronouncements that these women should be granted unemployment insurance benefits as long as they are able to work and available for work. After the *Turner* decision was rendered, the Department of Labor advised all state agencies to abolish disqualifications such as those struck down in *Turner*. It also advised the agencies to abolish any disqualifications that were similar to the other Utah statutory disqualification[18] not considered in *Turner* which disqualified a woman when it was "found that her total or partial unemployment is due to pregnancy." CCH Unemploy. Ins. Rep. ¶ 21,482 (1976), U.S. Department of Labor, Unemployment Insurance Program Letter No. 1-76. This disqualification would have affected women in Mrs. Wimberly's exact situation. The letter to state unemployment insurance administrations warned states that such a disqualification "would not be based on an individualized determination as to whether or not the individual was able to work, but only on the fact that her unemployment was due to pregnancy." *Id.* Certainly, if the Department of Labor considered section 3304(a)(12) as failing to remedy the problems identified in the letter, it would have noted the inadequacy of the statute in its later Commentary. Therefore, it is clear that the Department of Labor, both before and after the enactment of section 3304(a)(12), encouraged and intended the provision of unemployment benefits to women in Mrs. Wimberly's situation.

B. The Fact That the Department of Labor Has Certified Missouri As Complying With All Federal Minimum Requirements Has No Significance.

The Missouri Supreme Court and the Commission have asserted that the fact that the Department of Labor has

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18. This other Utah provision, Utah Code Ann. § 35-4-5 (h)(2) (1974) is discussed on p. 21 of this Brief.

certified Missouri as complying with all federal minimum requirements establishes that Missouri has not violated the law. (Pet. App. A12 and Commission's Brief p. 11). However, the continued certification of Missouri by the Department of Labor cannot be read as assuring compliance with section 3304(a)(12). Revised Statutes of Missouri Section 288.050.1(1) does not mention pregnancy, and therefore on its face, there is no apparent violation of section 3304(a)(12). Mrs. Wimberly has never claimed that she is challenging the validity of the Missouri statute. Rather, she is challenging the policy and practice of the Commission which disqualifies otherwise eligible women who have left their jobs due to pregnancy and are denied reinstatement in those jobs. The policy and practice, not the Missouri statute, violate the federal statute. There is no indication that the Department of Labor, in its certification process, has reviewed Missouri's policy regarding disqualifications involving pregnancy.

Furthermore, the Department of Labor has certified states as being in compliance when they clearly would not be in compliance under the Missouri Supreme Court and the Commission's interpretation of section 3304(a)(12). The Missouri Supreme Court and the Commission have suggested that the Department of Labor interprets section 3304(a)(12) as mandating the same treatment for pregnant or formerly pregnant claimants as is accorded disabled or ill claimants. (Pet. App. A9 and Commission's Brief p. 11). If this is true, then the Department of Labor should not certify states that distinguish between pregnancy and illness. However, the Department has continued to certify the states of Minnesota and North Dakota which have different policies toward pregnancy-related

separations than they have toward illness-related separations. (Pet. 11-13). Minn. Stat. § 268.09.1(2)(b) (Supp. 1986) and N.D. Cent. Code § 52-06-02.1(b) (Supp. 1985).

In Minnesota, a woman who leaves her job because of pregnancy and is denied a leave of absence or reinstatement is treated as having voluntarily quit her job and is disqualified from receiving benefits. (Pet. 12-13). If, however, a person is separated from his job because of serious illness, that person is not disqualified from receiving benefits. Minn. Stat. § 268.09.1(2)(b) (Supp. 1986).

In North Dakota, a woman is disqualified from receiving benefits if she left her job due to pregnancy and was denied reinstatement. She, too, is treated as having voluntarily quit her job. (Pet. 13). People who leave their jobs due to illness or injury, however, are not disqualified. N.D. Cent. Code § 52-06-02.1(b) (Supp. 1985).

Neither state expressly disqualifies these pregnancy-related claims pursuant to a statute. (Pet. 12-13). Rather, like Missouri, their disqualifications are based on policies and practices not apparent in their statutes. Despite the distinctions that Minnesota and North Dakota make between pregnancy-related separations and illness-related separations, the Department of Labor has certified both states as complying with the requirements of 26 U.S.C. § 3304. 50 Fed. Reg. 49,624 (1985). The act of certification by the Department of Labor, therefore, cannot be used as evidence of its interpretation of section 3304(a)(12), nor can it be used as evidence of a state's compliance with that statute.

III.

Congress' Purpose in Enacting Section 3304(a)(12) Establishes Its Intent to Ensure the Provision of Benefits to Women in Mrs. Wimberly's Situation and Is Consistent With the General Goals of F.U.T.A.

A. Only a Broader Interpretation of 26 U.S.C. § 3304(a)(12) Will Meet the General Goals of Congress in Amending F.U.T.A.

Section 3304(a)(12) was only one of a series of major amendments of F.U.T.A. adopted in 1976. Unemployment Compensation Amendments of 1976, Pub.L. No. 94-566; 90 Stat. 2667 (1976). The introductory comments at the hearings on the first draft of the 1976 amendments to F.U.T.A. reveal congressional intent to "improve the unemployment compensation programs so that they provide a more adequate source of protection for the Nation's workers and a more effective source of stability during periods of high unemployment."[19] This goal is consistent with the general aims of F.U.T.A. and the unemployment compensation system. Generally, when Congress amends a statute, it intends the amendment to be interpreted in a manner consistent with the general purpose of the statute as a whole. *Clark v. Uebersee Finanz-Korp*, 332 U.S. 480, 488-89 (1947), *See also Markham v. Cabell*, 326 U.S. 404, 409-11 (1945). Section 3304(a)(12), therefore, must

19. Phase III: Proposed Changes in the Permanent Federal-State Unemployment Compensation Programs, Before the Subcomm. on Unemployment Compensation of the Comm. on Ways and Means, 94th Cong., 1st Sess. 7 (1975) (statement of James Corman, Chairman, Subcomm. on Unemployment Compensation).

be read in light of the remedial purposes of the Act, which dispels the notion that Congress amended the statute to limit its application. 3 J. Sutherland, Statutes and Statutory Construction § 60.02 (C. Sands 4th ed. 1984). Such remedial legislation must be liberally construed, and any exceptions must be narrowly interpreted. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) and *Henry Broderick, Inc. v. Squire*, 163 F.2d 980, 982 (9th Cir. 1947). Thus, a restrictive interpretation of the federal statutes governing unemployment compensation would circumvent their broad purposes.

Section 3304(a)(12) is one of eighteen fundamental standards. 26 U.S.C. §§ 3304(a)(1)-(18) (1982 & Supp. I 1983 & Supp. II 1984); *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 594 (1937). States are required to comply with these standards in order to qualify for federal funding. *Id.* A narrow construction of the federal standards would effectively allow the states to violate the basic purposes of F.U.T.A. The labeling by Missouri of Mrs. Wimberly's separation from work because of pregnancy as a voluntary quit without good cause attributable to her work or her employer essentially allows Missouri to indirectly deny her benefits on the basis of pregnancy when it could not do so directly. Such a denial not only violates section 3304(a)(12) but it also defeats the broader remedial purposes of the 1976 Amendments in particular and of F.U.T.A. in general. A broader interpretation of section 3304(a)(12) would effectuate Congress' intent to protect the nation's workers.

B. Policy Considerations Recognized by Congress in Enacting Section 3304(a)(12) Support the General Goals of F.U.T.A. and Compel the Provision of Benefits to Women in Mrs. Wimberly's Situation.

Congress recognized that policy considerations support the conclusion that women who are denied reinstatement after leaving their jobs due to pregnancy are entitled to unemployment compensation. The provision of benefits to these women would promote and effectuate the broad policy behind section 3304(a)(12) to eradicate unjust disqualifications of women for pregnancy-related separations. Section 3304(a)(12), therefore, should be read to promote this policy. The words of a statute should be regarded as "embodying a delegation of authority [to the courts] to exercise responsible creative judgment in relating the statutory concept, spirit, purpose or policy to changing needs of society." 2A J. Sutherland, Statutes and Statutory Construction § 45.09 (C. Sands 4th ed. 1984).

Congress recognized that society has a distinct interest in protecting the unique and important rights of procreation and family life. *See e.g. Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (mandatory sterilization). Society also has a substantial interest in encouraging the survival of the human race. *See Zablocki v. Redhail*, 434 U.S. 374 (1978); *Skinner v. Oklahoma ex rel. Williamson, supra*. As more women join the work force, the changing needs of these women and society must be acknowledged and accommodated.

In a complex and changing society such as ours, too often the stability of a family is affected by economic conditions. It is inevitable that a pregnant woman will

have to leave her job at some time in order to give birth. The availability of an income source is critical. Those women who are fortunate enough to be granted a guaranteed maternity leave will not be harmed by having a child. However, women who are not granted a maternity leave or who are denied reinstatement in their jobs have no alternative but to obtain unemployment compensation in order to provide support for themselves and their children during the period of time in which they are seeking reemployment. As the District Court in *Brown v. Porcher* stated, when a "woman returns to the job market after having a child, she and her family can suffer real economic hardship if her employer does not re-hire her and she cannot collect unemployment compensation." 502 F. Supp. at 955. The court noted that women who have stopped working in order to have a child can remain "effective participants in the economy only if assistance is provided to encourage their return to work when they are physically able to do so." *Id.* at 956. The court emphasized that a woman needs the economic assistance to pay for child care and other expenses while looking for work; otherwise she cannot "compete in the employment process with others." *Id.* The denial of benefits because of pregnancy can force a woman to choose between employment and childbirth through subtle economic pressures that lessen her role in the economy. *See Buckley v. Coyle Pub. School System*, 476 F.2d 92, 96 (10th Cir. 1973).

Congress was fully aware of the economic problems experienced by unemployed pregnant women and new mothers who wanted to remain in the work force. Congress addressed these economic problems by enacting section 3304(a)(12). A "statute cannot be divorced from the circumstances existing at the time it was passed."

Wallace v. Jaffree, 53 U.S.L.W. 4665, 4671 n.49 (U.S. June 4, 1985) (No. 83-812) (citing *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951)).

The issue before this Court is one that may affect millions of working women in the United States. There are twenty-one million women in the United States between the ages of eighteen and thirty-four (the primary child-bearing ages) who are in the civilian labor force.[20] Approximately eighty-five percent of the women in this age range will give birth to at least one child during their working lives.[21] By enacting section 3304(a)(12), Congress acknowledged the need to acccommodate the ecomic concerns of these women as they relate to pregnancy and unemployment.

As in the past, the necessity for unemployment compensation for working mothers has consistently increased. The total number of mothers in the labor force with children under the age of six rose by nearly 200,000 during a recent year to reach 8.2 million in March 1985. "Labor Force Activities of Mothers of Young Children Continues at Record Pace," September 19, 1985, U.S. Department of Labor, Bureau of Labor Statistics 1. Half of all mothers of children under age three were in the labor force—up from one-third in 1975. *Id.* Sixty-seven percent of these

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20. Note, Denial of Unemployment Benefits at 1925, citing U.S. Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-20, No. 363, Population Profile of the United States: 1980 at 33 (1981) and U.S. Bureau of the Census, U.S. Department of Commerce, Current Population reports: Consumer Income, Series P-60, No. 132, Money Income of Households, Families and Persons in the United States: 1980 at 225 (1982).

21. Note, Denial of Unemployment Benefits at 1925, citing U.S. Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-20, No. 325, Fertility of American Women: June 1977 (1978).

women worked full-time. *Id.* at 2. For those mothers whose youngest child was three to five years of age, the proportion was 60 percent—up from 45 percent a decade earlier. *Id.* at 1. The total number of mothers in the labor force with children under eighteen rose by nearly 500,000 over the past year to a total of 20 million. *Id.*

Despite the increasing number of mothers and women of child-bearing age who are entering the work force, employment policies generally fail to accommodate them. As a result, many women are forced to choose between job security and motherhood. Indeed, many women workers who become temporarily incapacitated due to pregnancy are not guaranteed reemployment once they are able to return to work. Unfortunately, the United States Department of Labor, Bureau of Labor Statistics does not compile information on occupations or industries that do provide for pregnancy leaves and guaranteed reemployment. Therefore, it is not possible to fully document the number of women who are at risk of losing their jobs if they must be temporarily out of the work force because of bearing a child. However, Congress has continually been concerned about economic protections for mothers and women of child-bearing age. Recently, certain members of Congress have recognized that there is a great need for guaranteed maternity and paternity leaves. As a result, there is a bill pending in the House of Representatives that would require employers to provide parental leaves in cases involving the birth, adoption or serious illness of a child. H.R. 2020, 99th Cong., 1st Sess. (1985). This bill would further advance the economic security of working parents.

Minority and low-income women workers would suffer the most from a state policy that denies unemploy-

ment compensation to women in Mrs. Wimberly's situation. These women are the least likely to have employment protections such as maternity leaves, *See* B. Woody, and M. Malson, *Uncertainty and Risk in Low Income Black Working Women,* 1 Wellesley College, February 1984 (unpublished manuscript, available from the NAACP Legal Defense and Education Fund, Inc.), yet they have the greatest need for such protection since they tend to be the sole supporters of their families. "First Friday Report, Joblessness Among Women: A Portrait of Female Unemployment," at 10 and 17, November 1, 1985, Coalition on Women and Employment and the Full Employment Action Council, Washington, D.C.[22]

The hardship of suddenly being forced to find a new job after pregnancy is particularly great for women who are the heads of their households. The unemployment rates for these women have consistently been one and one-half to two times higher than either the national average of seven percent or the official unemployment rate for married women with a spouse present. "First Friday Report, Joblessness Among Women," *supra,* at 4. The unemployment rate among women who maintain their families has increased to 11.6% as of September 1985. *Id.* at 12.

22. In 1985, for example, 10.5 million single women maintained families compared to 2.3 million single men. "Labor Force Activity of Mothers of Young Children Continues at Record Pace," *supra,* at 2. Nearly 50 percent of all Black families with children under 18 years of age were maintained by single women in 1984, compared to 25 percent of Hispanic families and 15 percent of White families. "Families Maintained by Single Women," *WEAL Facts* 1, April 1985. (Women's Equity Action League). Families that are maintained by single women account for nearly half of all families who are living in poverty. In 1983, female-headed families comprised 47 percent of all poor families. *Id.* at 2. Over 68 percent of Black female-headed families and 70 percent of Hispanic female-headed families with children under 18 years of age lived in poverty in 1983. *Id.*

The impact on minority women is even more devastating. Black women have the highest unemployment rate of any group. First Friday Report, *supra,* at 15. While the overall official unemployment rate of Black women was 15.1 percent—more than twice the national rate—(*id.*) the rate was 21.7 percent for Black women heading households in September 1985. *Id.* at 12.

Thus a narrow construction of section 3304(a)(12) would have an adverse impact on low-income and minority working women. Not only are these women less likely to receive a guaranteed maternity leave, but they are also less likely to become reemployed by a different employer after pregnancy. Despite their ability and desire to work, these women would be unemployed and disqualified for unemployment compensation. Often, their only recourse would be to rely on welfare benefits in order to provide support for themselves and their families. Neither Congress nor society has an interest in promoting legislation that would create such a result.

A narrow construction of section 3304(a)(12) would create a tremendous hardship for all women who want to work and are able to work but are denied reinstatement in their jobs after pregnancy. Such a construction would be unjust and would defy Congress' goal of eliminating the hardship suffered by women for pregnancy-related separations from employment. It would defy the whole rationale behind legislating in this area. What possible reason could exist for prohibiting the disqualification of otherwise eligible women during certain stages of their pregnancies but sanctioning their disqualification after childbirth when they are denied reinstatement in their jobs? Rather, the policy behind section 3304(a)(12) is more realistically served by prohibiting any disqualification that affects otherwise eligible women when their

separation from work was due to their pregnancy. A broad construction of section 3304(a)(12) is justified to reach the result of prohibiting all pregnancy-related disqualifications of otherwise eligible women, a result clearly consistent with the purposes of F.U.T.A., section 3304(a)(12) and the intent of Congress to eradicate pregnancy-related disqualifications and promote the economic security of families.

Mrs. Wimberly does not assert that she had a right to unemployment compensation during the time she was on her maternity leave and was recovering from childbirth. She agrees that a woman who leaves her job due to pregnancy is not eligible for unemployment compensation benefits until she is able to work and available for work. Mrs. Wimberly is only requesting compensation for the period during which she was able to work and was available to return to work but was denied reinstatement due to the unavailability of a job.

Congress has adequately addressed this problem through section 3304(a)(12). Congress has recognized that unemployed women who are looking for work should not be denied unemployment insurance benefits simply because they left their jobs due to pregnancy. Any other construction of this statute would create a tremendous injustice to Mrs. Wimberly and all other working women in the United States of child-bearing age. Any working woman who becomes pregnant faces the prospect that her employer will not reinstate her when she has delivered her baby and is able to return to work. This Court has the opportunity to assure those women that society's interest and Congress' intent of protecting workers who leave their jobs for pregnancy-related reasons will be upheld and reinforced.

CONCLUSION

For the foregoing reasons, the decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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July 1, 1986

RESPONDENT'S

BRIEF

No. 85-129

In the Supreme Court of the United States

OCTOBER TERM, 1985

LINDA WIMBERLY,
Petitioner,

vs.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; AND J. C. PENNEY CO., INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED[1]

Whether Title 26, U.S.C. §1304(a)(12), of the Federal Unemployment Tax Act requires the State of Missouri, as a predicate to receipt of federal assistance, to provide unemployment benefits to an otherwise eligible claimant who left her employment due to pregnancy, in a case in which Missouri has based its disqualification of the claimant upon the interpretation and application of a state law which does not single out pregnancy for differential treatment, but which does disqualify claimants who leave their jobs for reasons not attributable to their work or to their employer.

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1. The respondents have rephrased the question presented from the manner in which it was stated in the Petition and Brief of the petitioner, and have couched the issue in terminology comparable to that used by the court below, the Missouri Supreme Court. The petitioner has stated the issue in such a way as to suggest that the State of Missouri has singled out women who leave their jobs to have children, and who are not reinstated by their employers thereafter, for special discriminatory treatment with respect to their eligibility for, or disqualification from, unemployment compensation benefits. In actual fact, Section 288.050.1(1), Mo. Rev. Stat. (1978), as interpreted and applied by the state courts of Missouri and by the respondents, is neutral as it relates to sex and pregnancy. If any otherwise eligible Missouri worker, male, female, or neuter, leaves a job for a cause not attributable to the worker or the employer, whether that cause be good, bad, or indifferent, such a worker is disqualified for unemployment compensation benefits. Pregnant women are not singled out for differential treatment.

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STATEMENT OF THE CASE

This is a case of statutory construction requiring the Court to ascertain and announce the appropriate interpretation and application of a specific provision of the Federal Unemployment Tax Act, 26 U.S.C. §3304(a)(12). The Missouri Supreme Court, on appeal from an administrative determination by the respondents, The Labor and Industrial Relations Commission of Missouri and the Division of Employment Security of the State of Missouri (hereinafter referred to as the Commission), determined that the petitioner, Linda Wimberly (hereinafter referred to as Wimberly or Claimant), was properly disqualified from receipt of unemployment compensation benefits upon the application of Missouri law and precedent, and that no different result was mandated by the federal statutory provision at issue.

A. Historical Context

The statutory framework for the nationwide unemployment system first enacted in 1935 is now found at 42 U.S.C. (& Supp. IV) §3301, *et seq.*[2] The joint federal-state program was enacted to provide partial wage replacement for eligible workers when unemployed.[3] The Senate Committee stated in its report on the original legislation:

> Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the states are left free to set up any unemployment compensation system they wish without direction from Congress.[4]

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2. This statutory scheme for unemployment compensation insurance was first enacted in 1935 as Titles III and IX of the Social Security Act, ch. 531, 49 Stat. 626, 639.

3. *California Department of Human Resources v. Java*, 402 U.S. 121 (1971).

4. Note 3, S. Rep. No. 628, 74th Cong., 1st Sess., 13 (1935).

Under the Federal Unemployment Tax Act (F.U.T.A.), 26 U.S.C. §3301, *et seq.*, a payroll tax is levied on employers. Each of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands receive an appropriation equal to the proceeds of the tax for the purpose of administrative costs and the employers receive a credit against the F.U.T.A. tax for their state unemployment insurance tax contributions, if the state statutes meet federal standards set out in 26 U.S.C.A. §3304(a) and 42 U.S.C. §503(a). Benefits to claimants are paid from a fund comprised of employer tax contributions.

In Missouri, provisions governing employers' liability coverage are set out at §§288.080, 288.090, 288.100, and 288.110, Rev. Stat. Mo. (1978). Tax rates are calculated under Section 288.120 and are required to be paid into the Missouri Unemployment Compensation Fund under Section 288.290. Each employer's contributions to the fund are credited to the employer's account within the fund and the employer's contribution rate is based upon unemployment compensation benefits charged to his account under Section 288.120. These state statutory provisions are consistent with the principle that each state shall have its own comprehensive statutory scheme governing its unemployment compensation program which statutory scheme must be consistent with the basic outlines of the unemployment insurance system established by federal law.

The federal statutes define the outlines of the unemployment insurance compensation system. Each state has enacted its own laws governing the system, with the requirement that each state's statutes must conform to federal standards at 26 U.S.C.A. §3304(a) and 42 U.S.C. §503(a). The basic federal standards with which a state's system of unemployment compensation, and the state plan delineating its system, must comply, now eighteen in number, includes the provision that the Secretary of Labor

shall approve any state law submitted to him if he finds that the state law provides that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy." 26 U.S.C. §3304(a)(12). The Secretary of Labor ascertains whether a state law conforms to federal standards. Missouri's law has not been ruled by the Secretary of Labor to be out of conformity with federal standards, including §3304 (a)(12).

In Missouri, a claimant for unemployment insurance benefits must satisfy a three-point test before that individual is entitled to receive benefits:[5] (1) Has the claimant earned a specified amount of wages or worked a specified number of weeks in covered employment during a particular base period? (2) If the first requirement is met, is the claimant eligible, meaning basically is the claimant able and available for work? (3) Finally, if the claimant has earned sufficient wages over a sufficient period of time and is able and available for work, is he or she nevertheless disqualified for some particular state law reason?[6] At issue in this case, although the claimant persists in framing the case in eligibility terms, i.e., was she able and available for work when denied benefits, is the third part of the test described, *supra*. That is, this case involves a disqualification under a specific provision of State law. Under Missouri law, disqualifications of claimants are governed by Section 288.050.1. Among other possible reasons for disqualification, the claimant may be disqualified if it is found "[t]hat he has left his work voluntarily without good cause attributable to his work or to

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5. According to the brief of the United States as *amicus curiae* in *Porcher v. Brown*, No. 81-1972 (1982), at page 3, all states apply some version of the three-point test used in Missouri.

6. The governing statutes in Missouri are Sections 288.034-288.070, Mo. Rev. Stat. (1978)

his employer . . . ."[7] This disqualification provision of Missouri law has been applied by state courts where workers have left work due to illness which is not related to the job or to the employment,[8] to include pregnancy.[9] Missouri case law has held uniformly that if employment is left for a medical reason not caused by or aggravated by the work, such a leaving is voluntary without good cause attributable to the work or to the employer, and the claimant is disqualified from receiving benefits. The Missouri Supreme Court characterized the disqualification provision at issue herein as evidencing "a manifest legislative desire to disqualify claimants who, like respondent left work for reasons that, while perhaps legitimate and necessary from a personal standpoint, are not causally connected to the claimant's work or employer."[10] This finding by the Missouri Supreme Court is consistent with the Commission's interpretation of Missouri law as disqualifying any claimant whose reason for leaving employment, however good or laudatory that reason may be, is unrelated to the work place. Therefore, reasons other than medical for leaving work would be covered under Section 288.050.1, but a medical reason, pregnancy, is involved in the instant case.

It is within the context as herein described that the claim of Mrs. Wimberly for unemployment compensation benefits arose, and now appears before this Court for review.

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7 Other reasons for disqualification, not at issue in this case, include discharge for misconduct and refusal to accept suitable employment. Federal standards also require states to impose disqualifications in certain other cases. See 26 U.S.C. §3304(a).

8. *Fifer v. Missouri Division of Employment Security*, 665 S.W.2d 81 (Mo.App., 1984).

9. *Bussman Manufacturing Co. v. Industrial Commission*, 235 S.W.2d 456 (Mo.App., 1960).

10. Petition for Writ of Certiorari to the Missouri Supreme Court (hereafter "Pet."), at A5.

B. This Case

The facts of this particular case, and its procedural history, are not in dispute. Wimberly filed her claim for unemployment compensation benefits on December 7, 1980 (Pet., A51). A deputy for the Division of Employment Security found that Wimberly was disqualified because she left her work with J. C. Penney Co., Inc., "voluntarily without good cause attributable to his [her] work or to his [her] employer on 8-23-80." (Pet., A52). The reason given by the deputy for disqualifying Wimberly was that she "quit because of pregnancy. She did not request a leave of absence. This was a personal reason for leaving." (Pet., A53).

Wimberly appealed the decision of the deputy to the Division's Appeals Tribunal. The Appeals Tribunal gave the claimant a full evidentiary hearing at which he was represented by counsel. The complete findings of the Appeals Tribunal follow:

> The claimant worked for the employer as a sales clerk/cashier for approximately three years at a rate of pay of $3.50 per hour. The claimant's last day of work was August 23, 1980.
>
> On August 23, 1980, the claimant was approximately seven months pregnant. The claimant requested a leave of absence because she was unable to continue working in her condition. The claimant's child was born on November 5, 1980. At the time the claimant commenced her leave of absence she did not know if the leave guaranteed a rehire. On December 1, 1980, the claimant spoke to the employer's personnel manager, who told her that there was no position available for her at that time. The employer's personnel manager testified that the claimant was placed on a leave of absence but that the leave of absence did not guarantee that she would be reinstated. It was explained by the personnel manager that if there was a position available for her upon

her return, she would be reinstated. The employer's personnel manager testified that the claimant was never on a maternity leave as such, and that the leave she was on did not guarantee reinstatement.

The Missouri Employment Security Law provides that a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages equal to ten times his weekly benefit amount if it is found that he left his work voluntarily without good cause attributable to his work or to his employer.

The Appeals Tribunal finds that the claimant quit her job voluntarily on August 23, 1980, when she informed the employer that she could not continue working because of her medical condition. It is found that the employer's policy regarding leaves of absence does not guarantee reinstatement and that the claimant would have been reinstated only if there was a position available for her. It is found that the employer was under no obligation to grant the claimant a leave of absence which guaranteed her rehire and that such was not the employer's policy. Although the claimant did have a good reason for leaving her employment, it is found that that reason was in no way attributable to her work or to her employer. Accordingly, it is found that the claimant quit her job voluntarily on August 23, 1980, without good cause attributable to her work or to her employer.

(Pet., A48-50).

The Labor and Industrial Relations Commission of Missouri denied Wimberly's petition for review, thereby adopting the findings and conclusions of the Appeals Tribunal.[11] (Pet., A46-47).

The Claimant next appealed to the Circuit Court of Jackson County, Missouri, which reversed the decision of the Commission (Pet., A40-45). The Circuit Court concluded that existing Missouri law was contrary to 26

11. Section 288.201.1, Mo. Rev. Stat. 1978.

U.S.C. §3304(a)(12). As construed by *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

The Missouri Court of Appeals for the Western District affirmed the Circuit Court (Pet., A23-40). The Missouri Court of Appeals was concerned with the soundness of the ruling in *Brown v. Porcher, supra,* but nevertheless determined that it must follow that case as precedent, believing that it was required to follow decisions of the federal courts construing federal statutes (Pet., A37).

The Missouri Supreme Court reversed, finding in favor of the Commission (Pet., A1-20, 22-23, the majority opinion appears at pages A1 through A13 of the Petition for Certiorari). Wimberly's petition for rehearing by the Missouri Supreme Court was overruled (Pet., A21).

The majority opinion below recognized the opinion of the United States Court of Appeals for the Fourth Circuit construing Title 26, U.S.C. §3304(a)(12) in *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), *cert. den'd*, 459 U.S. 1150 (1983). However, the Missouri Supreme Court declined to follow that case. Among other authority for so declining, the majority opinion below cited the reservations expressed by Mr. Justice White, joined by two other justices, in dissent to the action of this Court in denying certiorari in *Brown v. Porcher*, 459 U.S. at 1150. In effect, Justices White, Powell, and Rehnquist have already stated a position on the issue presented herein in accord with results reached by the Missouri Supreme Court.

The court below went on to evaluate the clear language of §3304(a)(12), to conclude that the use by Congress of the qualifying phrase ". . . *solely* on the basis of pregnancy . . ." (emphasis added) indicated an attempt to proscribe only such state laws as denied compensation on the basis of pregnancy alone. In this case, the petitioner was denied unemployment compensation benefits because

she left work for reasons which were not attributable to her employer or connected with her work. The Missouri Supreme Court recognized that the state law resulting in said denial made no express reference to pregnancy.

The Supreme Court of Missouri relied not only upon the clear language of §3304(a)(12) but upon legislative history with respect to that section as well. In that regard, the court below cited the proposed bill introduced in 1975 which eventually became the federal statute now in question. It believed that the original language of the law would have required a different determination in this case.

Thirdly, the court below found that this case was an appropriate instance in which to defer to the federal agency administering §3304(a)(12), the Department of Labor. The Department of Labor's construction of that statutory section is consistent with the position of respondents and with the opinion of the Missouri Supreme Court.

Only after citation to Justice White's dissent from the denial of certiorari in *Brown v. Porcher*, examination of the plain language of the statute in question, reference to the legislative history of the statute at issue, and the grant of deference to the United States Department of Labor's construction of that statutory section, did the court below decline to disavow a long and substantial body of Missouri case law in favor of the questionable conclusions reached by the Fourth Circuit in *Brown v. Porcher, supra.*

On July 23, 1985, Wimberly filed a petition for writ of certiorari in this Court. This Court then invited the Solicitor General to express the views of the United States. The Solicitor General responded with his Memorandum for the United States Amicus Curiae. The Solicitor General has taken the position that the decision of the Missouri Supreme Court below is correct, and that the contrary decision of the United States Court of Appeals

for the Fourth Circuit in *Brown v. Porcher, supra,* was wrong. The Solicitor General has concluded that:

> Both the language and legislative history of Section 3304(a)(12) indicate that Congress meant to ban only state laws that single out pregnancy for disadvantageous treatment; it did not intend to require states to afford preferential treatment to pregnancy. And this has been the consistent interpretation of the Department of Labor, which is the agency responsible for the administration of F.U.T.A. and which played a role in the development of the 1976 legislation. Accordingly, the Missouri Supreme Court correctly concluded that the Missouri statute does not violate F.U.T.A. because it does not single out for disadvantageous treatment voluntary separations due to pregnancy, as opposed to voluntary separations for other health or personal reasons unrelated to employment.

Memorandum for the United States Amicus Curiae, page 2.

Despite his conclusions, the Solicitor General recommended that certiorari not be granted.

On April 21, 1986, this Court granted the Claimant's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I.

A. In 1935, with the passage of the Social Security Act, Congress created a cooperative federal-state scheme in which states would take sole responsibility for administration of unemployment compensation programs within their own jurisdictions. All states have opted to participate in the program. At the inception of F.U.T.A., Congress expressed its intention to create a system which provided for "genuine unemployment compensation" and "not merely [a] relief measure." Sen. Rep. No. 628, 74th Cong., 1st Sess., at 13. Except for certain fundamental standards, the details of state unemployment compensation programs are left to the discretion of the states themselves.

Section 3304(a)(12) enacted in 1976, is one such standard. The federal-state cooperative program of unemployment compensation was intended not as welfare but as a true system to assist individuals while they are temporarily out of work. Such an intent is entirely inconsistent with an interpretation of §3304(a)(12), which would create a preferential class of pregnant and formerly pregnant women.

The law in Missouri requires the reason for a person being unemployed and his former work place to be related. If §3304(a)(12) is interpreted to invalidate this provision of state law, the unemployment compensation program will move in a direction entirely inconsistent with the original aim of F.U.T.A. and toward a relief or social welfare program, providing in essence a form of employer-financed and state-operated health insurance for a limited class of pregnant and formerly pregnant women. To suggest that Congress intended such a result when it enacted the 1976 amendments which added §3304(a)(12) would be entirely inconsistent with its relatively contemporaneous and clearly expressed intention in enacting relevant portions of Title VII, including 42 U.S.C. §2000e(k), as amended in 1978, providing that pregnant women be treated the same for all employment-related purposes as nonpregnant persons.

B. Under the Missouri policy and practice at issue, a formerly pregnant woman is treated exactly the same as any other claimant for unemployment compensation benefits who left his or her most recent work because of a temporary physical disability, or because of any other reason, good or bad, which is not attributable to the work place. Such a policy and practice is entirely consistent with the plain language of §3304(a)(12). That provision of federal law provides that persons shall not be disqualified from compensation "solely" for reasons related to pregnancy. The use by Congress of the qualifying word

"solely" suggests that Congress intended to prohibit only those state laws which deny compensation on the basis of pregnancy standing alone. In other words, Congress intended to proscribe state laws which automatically disqualify pregnant or formerly pregnant women, excluding all other considerations.

The language used by Congress does not suggest that a state must extend benefits to individuals who leave work voluntarily because of pregnancy when it has framed its program so as to deny benefits to those who leave work voluntarily for a host of other reasons that are not employment related, including health reasons and other good personal reasons of a compelling nature. Brief for the United States as *Amicus Curiae, Porcher v. Brown,* No. 81-1972 (October Term, 1982), page 8. In her brief, the petitioner attempts to transfer the terminology used by Congress, i.e. "solely," into an entirely different context. She answers the question of whether she left work solely because she was pregnant. She fails to properly address the question of whether she was disqualified "solely because she was pregnant." The issues are entirely different. We are not concerned with whether Wimberly left work solely because she was pregnant, which the Commission admits, but whether she was disqualified from receipt of unemployment compensation benefits solely on the basis of pregnancy or termination of pregnancy, which she clearly was not. In Missouri, no person is denied compensation because of pregnancy or termination of pregnancy as a single reason, alone, without any other consideration sharing in the decision to compensate or not to compensate. The Compact Edition of the Oxford Dictionary (1971 Ed.), at p. 2910.

In *Southeastern Community College v. Davis,* 442 U.S. 397 (1979), the Court was asked to construe language in Section 504 of the Rehabilitation Act of 1973, which

provided that "[n]o otherwise qualified handicapped individual" shall be excluded from participation in, denied the benefits of, or be subjected to discrimination under, any federally funded program "solely by reason of his handicap." The Court concluded that the aforesaid language mandated only "evenhanded treatment of qualified handicapped persons," and that that language did not require states to provide affirmative action programs for the handicapped. Similar statutory language requires the same result in this case.

C. The legislative history of §3304(a)(12) is consistent with its plain language. In its deliberations on the statute, the rationale consistently proffered for the provision by Congress was that it would codify the result in *Turner v. Department of Employment Security,* 423 U.S. 44 (1975). In *Turner,* this Court had invalidated a state law which provided for the presumptive ineligibility of pregnant women for benefits during specified periods of time before and after childbirth. S. Rep. No. 1265, 94th Cong., 1st Sess. 19-20, 21-22 (1976). During the course of its deliberations, Congress specifically referred to nineteen states which had special disqualification provisions pertaining to pregnancy. The list of those nineteen states had been compiled by the Department of Labor and included only those states which had specific laws dealing with pregnancy as a separate and distinct item to be considered in determinations of eligibility for benefits. The inference is strong, therefore, that the federal statute at issue in this case was enacted to remedy a specific evil existing in those states identified as having presumptive disqualifiers in effect for pregnant or formerly pregnant claimants. The nineteen states being considered by Congress did not include either South Carolina or Missouri, States who do not single out pregnancy for special disadvantageous treatment and whose policies have been the subject of the opinions in *Brown v. Porcher, supra,* and

the Missouri Supreme Court. Sponsors of the bill which ultimately became §3304(a)(12) understood and stated that the legislation would require only that pregnant and formerly pregnant women be treated no differently than any other unemployed individual available for work. Rep. Stiger, 122 Cong. Rec. 22, 518 (1976); Rep. Corman, Phase I: Existing Unemployment Compensation Programs: Hearings Before the Subcom. on Unemployment Compensation of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 87 (1975).

D. The Department of Labor participated in the deliberations and hearings which led to the enactment of §3304(a)(12). That federal agency is also responsible for administering the federal-state unemployment program, including the fundamental standards of which the above statutory section is a part, as against the states. The Department of Labor has consistently construed this statutory section in the same manner that the court below has construed it. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Miller v. Youakin,* 440 U.S. 125, 144 (1979). In his memorandum *amicus curiae* in this case, the Solicitor General has expressly told the Court that the position of the United States, and therefore of the Department of Labor, remains that the Missouri statute and policy at issue herein is valid under federal law, including §3304(a)(12)

II.

This case requires the construction of a federal statute. Using the standard approaches to a problem of statutory construction, the conclusion is inescapable that the opinion of the Missouri Supreme Court in this case should be affirmed. There also exist sound reasons of a public policy nature which support the position of the court below.

The State of Missouri has made the rational decision of choosing to disqualify claimants for benefits who leave their work for reasons not causally connected to their job, no matter how legitimate and necessary leaving work may have been. Such a policy decision by a state is consistent with the purpose of F.U.T.A. to provide temporary assistance to persons out of work due to the economics of the job market and conditions prevalent in the work force. Unemployment benefits are funded by taxes on employers. Principles of fundamental fairness suggest that such taxes be used to compensate only those claimants who are out of work for reasons related to the work places operated by those employers.

Any kind of sex or child-bearing discrimination is dangerous to society, whether that discrimination in a specific case would appear to favor or disfavor women and mothers. Discrimination is simply bad public policy, and the position of the petitioner would lead to the inescapable result of preferential, but discriminatory, treatment being afforded to recently pregnant claimants. *Geduldig v. Aiello,* 417 U.S. 484 (1974). Her position would also have the anomalous consequences of treating pregnant women equally while they are a part of the work force (Title VII), but treating them preferentially after they become unemployed.

The result urged upon the Court by petitioner would be inconsistent with conclusions reached in *Orr v. Orr,* 440 U.S. 258 (1979), and *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979). Missouri statute and practice is gender- and pregnancy-neutral. Previous decisions of this Court indicate that such a statute and practice is appropriate. If a contrary position were forced upon the State by means of a twisted and convoluted interpretation of §3304(a)(12), serious equal protection ramifications would result, because claimants, other than new

mothers, who leave their work for good reasons, including temporary physical disabilities, would become the subjects of discrimination.

Because Missouri does not single out pregnant women and recent mothers for differential or discriminatory treatment, it should not be assumed that Congress intended to impinge upon the traditional function of the State to make individualized decisions regarding eligibliity criteria and disqualifications upon claims for unemployment compensation benefits.

ARGUMENT

In January, 1983, this Court denied a petition for writ for certiorari to review the opinion and decision of the United States Court of Appeals for the Fourth Circuit reported as *Brown v. Porcher,* 660 F.2d 1001 (4th Cir. 1981). *Porcher v. Brown,* 459 U.S. 1150 (1983). The Fourth Circuit had invalidated a South Carolina statute, policy, and practice, which applied in exactly the same way to a formerly pregnant claimant as does the statute, policy, and practice of Missouri at issue in the present case, on the basis that South Carolina's law was in violation of the provisions of 26 U.S.C. §3304(a)(12). Three justices of this Court would have granted certiorari in the Fourth Circuit case, including Justices White, Powell, and Rehnquist, who clearly expressed misgivings about the validity of the opinion of the Fourth Circuit.

> It is by no means clear, however, that §3304(a)(12) does not simply provide that pregnancy must be treated like all other disabilities—that pregnancy simply cannot be singled out for unfavorable treatment. The Department of Labor adheres to such an interpretation and thus disagrees with the Fourth Circuit's interpretation of §3304(a)(12).

459 U.S. at 1150.

This Court has now determined to review an opinion of the court below, the Supreme Court of Missouri, which is in clear conflict with the conclusion reached by the Fourth Circuit.

The construction of §3304(a)(12) by the Supreme Court of Missouri is clearly consistent with that statute's plain language, its legislative history, and the interpretation of the statute by the Department of Labor which is responsible for its administration. A contrary result, such as that reached by the Fourth Circuit in *Brown v. Porcher, supra*, and advocated by the petitioner in this case, would require the State of Missouri to give preferential treatment to individuals who voluntarily leave their employment on account of pregnancy, as opposed to those who leave on account of other types of temporary physical disability or other personal reasons not related to employment.

The issue in this case is relatively straightforward, considering the fact that it has been accepted for review by this nation's highest court. In Missouri, after a claimant for unemployment compensation benefits has worked for a specified period of time at a specified wage, he or she must meet two additional requirements. First, the claimant must be able and available for work. Section 288.040.1 (1), Mo. Rev. Stat. 1984. Second, the claimant must be otherwise free from disqualification. Section 288.050.1(1) disqualifies a claimant if he or she "left his work voluntarily without good cause attributable to his work or to his employer." The appellate courts of Missouri have interpreted that provision to disqualify, among others, claimants who leave their job on account of illness, including pregnancy, which is unrelated to the work place.[12] The

12. See *Fifer v. Missouri Division of Employment Security*, 665 S.W.2d 81 (Mo.App., 1984); *Duffy v. Labor & Industrial Re-*

(Continued on following page)

petitioner asks this Court to find that the above-referenced Missouri statute, as applied by the appellate decisions of Missouri courts, is in violation of 26 U.S.C. §3304(a)(12), which requires that state unemployment compensation laws provide that "no person shall be denied compensation under such State laws solely on the basis of pregnancy or termination of pregnancy." The Fourth Circuit found that the law and practice of South Carolina, identical to that of Missouri, did violate the aforesaid federal law. The court below found that the Missouri statute and practice did not violate the law.

In Point I, we shall show that the plain language of the federal statute in question, its legislative history, and the interpretation of the statute by the Department of Labor all mandate that the decision of the Supreme Court of Missouri be affirmed. In Point II, we shall demonstrate that, not only was the court below correct as a matter of statutory construction, but that sound considerations of public policy also dictate that the court not create out of 26 U.S.C. §3304(a)(12) a social welfare system giving preference to pregnant and formerly pregnant women with respect to unemployment compensation determinations.

Footnote continued—

lations Commission, 556 S.W.2d 195 (Mo.App., 1977); *Bussman Manufacturing Co. v. Industrial Commission*, 335 S.W.2d 456 (Mo.App., 1960). *See also, Division of Employment Security v. Labor & Industrial Relations Commission*, 617 S.W.2d 620 (Mo. App., 1981); *Neeley v. Industrial Commission*, 379 S.W.2d 201 (Mo.App., 1964); and *LaPlante v. Industrial Commission*, 367 S.W.2d 24 (Mo.App., 1963). As found by the court below,

> [t]hese decisions persuasively demonstrate that the wording of §288.050.1(1) evidences a manifest legislative desire to disqualify claimants who, like respondent, left work for reasons that, while perhaps legitimate and necessary from a personal standpoint, were not causally connected to the claimant's work or employer.

(Pet., A5).

I.

The Respondent Labor And Industrial Relations Commission Did Not Disqualify The Petitioner Applicant From Unemployment Compensation Benefits "Solely On The Basis Of Pregnancy Or Termination Of Pregnancy," As State Laws Are Prohibited From Doing By 26 U.S.C. §3304(a)(12), Because The Disqualification Of Petitioner Was Based Upon The Application Of A State Law Which Does Not Treat Pregnancy Differently From Other Non-Job-Related Terminations Of Employment; And The Clear Language Of §3304(a)(12), Its Legislative History, And The Interpretation Of The Federal Agency Charged With Its Enforcement, Mandates That The Decision Of The Missouri Supreme Court, Upholding The Commission's Disqualification Of Petitioner, Be Affirmed.

A.

The Historical Development Of F.U.T.A. Is Inconsistent With An Interpretation Of §3304(a)(12) Which Would Grant Formerly Pregnant Women Special Preferential Status.

The history of the federal-state cooperative unemployment insurance system has been documented in several decisions of this Court. *See generally, Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *California Department of Human Resources v. Java*, 402 U.S. 121 (1971). The Court has described the program as "a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 526 (1937). As a practical matter, Congress created a cooperative federal-state scheme in which states would take sole responsibility for administration of the program within their own jurisdiction. The program was enacted to provide partial wage replacement for eligible workers when unemployed.

The present federal-state system was created in the late 1930's, beginning in 1935 with the passage of the Social Security Act, 49 Stat. 620, followed quickly by the passage of unemployment compensation acts by all the states. In practice, employers pay a tax, nine-tenths of which goes into a state fund for the payment of benefits for unemployed workers, and one-tenth of which goes to the federal government for state and federal administrative expenses. In order to receive these federal funds for administrative purposes, and in order that employers might count their contributions to state unemployment compensation systems as credits against federal taxes which would be otherwise due, the states must comply with certain "fundamental standards." *Steward Machine Co., supra,* 301 U.S. at 594. These standards or guidelines appear at 26 U.S.C. §3304. These standards were enacted "to make certain that the states actually have unemployment compensation laws, rather than mere *relief measures.*" (Emphasis added). Sen. Rep. No. 628 (to accompany H.R. 6260), 74th Cong., 1st Sess., at 12 (1935).

States are not required to operate an unemployment compensation program under F.U.T.A., and to that extent the standards or guidelines adopted by Congress are voluntary. As is usually the case with well funded federal programs, however, the lure of tax credits and grants in return for cooperation with the federal government has, in practice, constituted "an offer that could not be refused." *State of New Hampshire Dept. of Employment Security v. Marshall*, 616 F.2d 240, 241 (1st Cir., 1980), *appeal dismissed* and *cert. den'd*, 499 U.S. 806 (1980).

With the exception of these "fundamental standards," Congress intended to leave the details of the programs to the states:

> Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensations acts and not merely relief measures, the states are

> left free to set up any unemployment compensation systems they wish, without dictation from Washington.

Sen. Rep. No. 628 (to accompany H.R. 7260), 74th Cong., 1st Sess., at 13. *Accord,* H. Rep. No. 615 (to accompany H.R. 7260), 74th Cong., 1st Sess., at 7-8.

It is important to emphasize that Congress expressed its intent, at the inception of F.U.T.A. in 1935, that the law was intended not as welfare but as a true system to assist individuals while they are temporarily out of work. Such an intent is entirely inconsistent with the proposition that §3304(a)(12) has created a preferential class of pregnant and formerly pregnant women who are to be granted benefits regardless of the application of state laws which are neutral on their face with respect to sex and pregnancy, and which are intended to limit the receipt of unemployment benefits to those whose unemployment is truly connected with the work place and the economics of work conditions and availability. We quote from the Brief for the United States as *Amicus Curiae* in *Porcher v. Brown,* No. 81-1972, Supreme Court of the United States, October Term, 1982:

> For the most part, decisions regarding eligibility criteria, disqualification, waiting periods, benefit rates, and similar subjects have been the province of the states. *See Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 483-484 (1977). Moreover, both the states and Congress have been concerned with protecting the fiscal integrity of state unemployment compensation programs [citation omitted] and with the possibility that states might grant eligibility greater than their funds could handle [citation omitted].
>
> In light of Congress' "sensitiv[ity] to the importance of the State's interest in fashioning their own unemployment compensation program," *New York Telephone Co. v. New York Department of Labor, supra,* 440 U.S. at 559, Section 3304(a)(12) should not be read to require that states alter their traditional approaches to disqualifications for benefits, particularly in a manner that increases the financial obligations of their unemployment compensation funds unless it is clear that Congress intended such a result.

Id., at 14.

The "fundamental standards," referred to above as enacted by Congress as guidelines for state laws, six in number in 1935, has swollen to eighteen in the present 26 U.S.C. §3304. The essential character of the standards, however, has not changed from the original aim of maintaining a true unemployment compensation system. The petitioner suggests that Congress has moved away from prescribing the standards necessary to ensure that a true unemployment compensation system exists and has elected to enter a field which has been left to the states, namely, individual determinations of eligibility and disqualification based upon the application of gender and disability neutral provisions of state law. Moreover, if a specific class of unemployed persons, specifically pregnant or formerly pregnant women, are to receive benefits without regard to the provisions of state laws which require unemployment and the work place to be inextricably entwined, the unemployment compensation program will move in a direction entirely inconsistent with the original aims of F.U.T.A.: that is, toward a relief or social welfare program, providing in essence a form of employer-financed and state-operated health insurance for this limited class of claimants.

To infer such an intent to Congress when it passed the 1976 amendments which added §3304(a)(12) to the above-referenced "fundamental standards," the intent suggested by the claimant, would ascribe a congressional intent entirely inconsistent with the provisions of the relatively contemporaneous enactments of Title VII. Title VII, and specifically 42 U.S.C. §2000e(k), as amended in 1978, provides that "women affected by pregnancy, childbirth, or other related medical conditions shall be treated

the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[13] It strains credulity to suggest that Congress intended for pregnant women to enjoy the same rights as others physically disabled when they are on the job, but that they were intended to have an elevated status once their employment had ceased. Likewise, we find it incomprehensible that Congress should have intended preferential treatment for pregnant women when it enacted §3304(a)(12), but have only intended equal treatment when it enacted the provisions of Title VII relevant to pregnancy.

B.

The Plain Language Of §3304(a)(12) Indicates That Congress Prohibited Only Presumptive Disqualifications Of Pregnant And Formerly Pregnant Women.

> Though we may not end with the words in construing a disputed statute, one certainly begins there.[14]

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13. In its *amicus curiae* brief in this case, the American Civil Liberties Union has construed §3304(a)(12) consistently with the interpretation and construction of the Commission and the court below. The ACLU has found nothing to suggest an inferred intent on the part of Congress to create a special category or entitlement for pregnant or formerly pregnant claimants. ACLU Brief *Amicus Curiae*, page 3. Nevertheless, the ACLU has recommended that the Court remand this case for a factual determination as to whether Missouri employers or state officials discriminate in actual practice against pregnant or formerly pregnant women despite the neutral and acceptable statute and policy applied in this case. *Id.* at 24. Although the Commission appreciates the support of the ACLU of its position on the merits, we must point out that this latter suggestion has no reference whatsoever to the actual case before the Court. We are concerned only with Mrs. Wimberly. This is not a class action. Furthermore, discrimination in fact against women, and specifically pregnant women, in the work place is covered by and prohibited by the provisions of Title VII. In this case, we are concerned only whether the Missouri statute and practice challenged is consistent with the provisions of §3304(a)(12). It would be a separate case altogether if the Court was confronted with the determination of whether violations of Title VII were occurring in the work place.

14. Justice F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 535 (1947).

This is a case of statutory construction. The Court is being called upon to determine whether 26 U.S.C. §3304 (a)(12) mandates, as a predicate to the State of Missouri's receipt of federal funds under F.U.T.A., that the Commission give preferential treatment to individuals who voluntarily leave their employment on account of pregnancy as opposed to those who leave for other types of temporary disability or other personal reasons not related to employment, or whether the aforesaid federal statute only prohibits presumptive disqualifications of pregnant and formerly pregnant women. As in every case of statutory construction, the starting point is the plain language of the statute itself. *Ernst & Ernst v. Hockfelder,* 425 U.S. 185, 197 (1976); *TVA v. Hill,* 437 U.S. 153, 173 (1978); *Consumer Product Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108 (1980).

In this case, the Court must construe the meaning of the language used by Congress in enacting 26 U.S.C. §3304(a)(12):

> [a] Requirements - The Secretary of Labor shall approve any state law submitted to him, within 30 days of submission, which he finds provides that -
>
> * * *
>
> (12) No person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy.

The court below was convinced of its position based in part upon the dissent of Justice White, joined in by Justices Powell and Rehnquist, from the denial of certiorari in *Porcher v. Brown,* 459 U.S. 1150 (1983). Agreeing with the analysis of Justice White, the Missouri Supreme Court construed the plain language of the statute as follows:

> We share Justice White's doubts regarding the efficacy of Brown's interpretation of §3304(a)(12). First, the court in *Brown* ignored Congress' use of the qualifying phrase ". . . *solely* on the basis of preg-

> nancy . . . ." (emphasis added). The use of the word "solely" indicates that Congress intended to proscribe state laws that denied compensation on the basis of the pregnancy alone. Neither the Missouri statute nor the South Carolina statute challenged in *Brown* make an express reference to pregnancy: In each case compensation was denied because the claimant had left work for reasons that were not attributable to the employer or connected with the work. If Congress had intended to bar disqualification on any ground in cases involving pregnancy, as *Brown* holds, it could have unambiguously expressed its intent without using the word "solely."

(Pet., A10).

The Commission agrees wholeheartedly with the construction of the statutory language of §3304(a)(12) made by the United States as *amicus curiae* in *Brown v. Porcher.*

> Use of the word "solely" indicates that Congress meant to ban only those state laws that single out pregnancy for disadvantageous treatment. The language does not suggest that a state must extend benefits to individuals who leave work voluntarily because of pregnancy when it has framed its program so as to deny benefits to those who leave work voluntarily for a host of other reasons that are not employment related, including health reasons and various other personal reasons of a compelling nature. The Court of Appeals' interpretation which ignores the word "solely" conflicts with the recognized principle that a statute should be construed so as to give effect, if possible, to every word Congress used. [Citations omitted.][15]

We believe that the petitioner, like the Fourth Circuit in *Brown v. Porcher, supra,* has ignored or glossed over the use by Congress of the word "solely" in the subject legislation. At the very least, Wimberly so distorts the plain language of the statute so as to draw attention away

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15. Brief for the United States as *amicus curiae*, *Porcher v. Brown*, No. 81-1972 (October Term, 1982), page 8-9.

from the word "solely" in the context of the remaining statutory language.

The question to be answered by this Court is whether the Missouri statute (Section 288.050.1(1), Mo. Rev. Stat.), as applied, which resulted in the disqualification of Wimberly for unemployment compensation benefits, denies benefits "solely on the basis of pregnancy or termination of pregnancy." Clearly, the answer must be that it does not. Wimberly was disqualified from receiving unemployment compensation benefits because Missouri disqualifies all claimants for benefits who leave work, without a guarantee of reinstatement and who were not able to get their jobs back after they were again able and available for work, where the reason for leaving work was not related to the job or to the employer. In such cases, Missouri terms the reason for leaving work as "voluntary." Wimberly was not disqualified "solely" because she had been pregnant. Wimberly was disqualified because her reason for leaving her most recent job was not related to that job.

The brief of petitioner devotes several pages to an attempt to escape from under the clear consequences of the use by Congress of the term "solely" in the statute. In so doing, the Claimant attempts to direct the attention of the Court away from the central inquiry. Under §3304(a)(12), the issue to be determined is whether Missouri disqualifies claimants for benefits solely because of pregnancy. In her brief, Wimberly attempts to pose a different issue altogether: Did she leave work solely because she was pregnant? Certainly, it is unnecessary for this Court to determine factually whether Wimberly left her most recent work solely because she was pregnant. No controversy exists as to that fact. Nevertheless, that is the question which the petition seeks to impose upon the Court as the issue to be determined in this case (Brief for petitioner, page 12). The petitioner's reasoning is both

convoluted and misleading. In rough terms, her syllogism is as follows: Wimberly left work because she was pregnant. She was denied unemployment benefits because she left work. Therefore, Missouri disqualifies claimants because they are or have been pregnant. It is with this syllogism, which amounts to little more than simple legal casuistry, that Claimant dispenses with the use by Congress of the word "solely."

Put into its proper context, the issue is not whether Wimberly left work solely because she was pregnant, but whether she was disqualified from receipt of unemployment compensation benefits solely on the basis of pregnancy or termination of pregnancy. The qualifying term "solely" is crucial to the determination of the intent of Congress. It denotes that Congress meant only to ban the singling out of pregnancy for disadvantageous treatment. Missouri does not single out pregnancy for disadvantageous or discriminatory treatment. Any person, male or female, who leaves his or her employment for a good medical reason, not associated with the work place, or any other good and valid reason, and his or her previous job is not thereafter available to him or her, is disqualified from receipt of unemployment compensation benefits under Missouri law. The disqualification of Mrs. Wimberly was not "solely" due to her pregnancy, but due to the application of Missouri law, policy, and precedent, which treats persons who have left their jobs for reasons not attributable to the work place as having voluntarily terminated their employment. Missouri has not created a special category for pregnancy-related claims. Therefore, the petitioner was not denied benefits "solely" on the basis of pregnancy. The word "solely," given its plain, ordinary definition, means "to the exclusion of all else." Webster's New Collegiate Dictionary, 1097 (8th Ed. 1980). Missouri denies no claim for unemployment benefits on the basis of the pregnancy or former pregnancy of

the applicant to the exclusion of all other considerations.[16] Pregnancy or termination of pregnancy is never the exclusive reason for a claimant, in Missouri, being found disqualified. Rather, matters of eligibility and disqualification are considered upon the bases of requirements that are wholly neutral as to the reasons for termination of employment, except that the terminations of employment must be job-related if the applicants are to qualify.

The definition given to the term "solely" by The Compact Edition of the Oxford English Dictionary (1971 Ed.) is also instructive. At page 2910, The Oxford Dictionary defines "solely" as "a single [thing]; without any other as an associate, partner, sharer, etc.; alone; occas. without aid or assistance." In Missouri, no person is denied compensation because of pregnancy or termination of pregnancy as a single reason, alone, and without any other consideration sharing in the decision to compensate or not to compensate.

Other cases are instructive in construing the plain language of the federal statute in question. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), this Court was called upon to construe language included by Congress in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Section 504 provides that "[n]o otherwise qualified handicapped individual" shall be excluded from participation in, be denied the benefits of, or be subjected

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16. In fact, many pregnant and formerly pregnant claimants for benefits would not be disqualified under Missouri policy and practice. For example, if the conditions prevalent in the work place exacerbated the medical condition of pregnancy so that a woman was required, upon a doctor's orders, to leave work earlier than would otherwise be necessary to give birth, Missouri would find, in such a situation, that the reason for leaving work was job connected. As another example, if a woman left work to give birth under a guarantee by her employer that her job would remain available, and thereafter when the woman was again able to work, no job was given to her, then the Commission would find that the claimant had been terminated by her employer and was therefore not disqualified from receiving benefits.

to discrimination under, any federally-funded program "solely by reason of his handicap." This Court rejected the argument that this language imposes a duty or obligation on recipients of federal funds to grant preferential treatment to, in effect provide affirmative action programs for, the handicapped. The Court concluded that an educational institution is not required, by the language of Section 504, to make substantial modifications in its programs to allow disabled or handicapped persons to participate. Section 504 provides only that the possession of a handicap, standing alone, is not a permissible ground for assuming an inability to function in a particular context. *Id.* at 405, 411.

Southeastern Community College v. Davis, supra, was followed by the Ninth Circuit in *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California,* 719 F.2d 1017 (1983), *cert. den'd,* 467 U.S. 1252. That case held that, by its own terms, Section 504 does not require a federal fund recipient to "make subsantial modifications in, or to alter the nature of, regular programs to allow disabled persons to participate." *Id.* at 1023. The Ninth Circuit adopted the language of this Court that the Rehabilitation Act mandates "evenhanded treatment of qualified handicapped persons." *Id.* at 1023, quoting from *Southeastern Community College v. Davis,* 442 U.S. at 410. In effect, the use of the term "solely" in the Rehabilitation Act has been found by this Court and the Ninth Circuit not to require an affirmative action obligation on recipients of federal funds. In this case, §3304(a)(12) does not mandate that Missouri institute an affirmative action program for pregnant or formerly pregnant wimen, only that it treat such applicants for unemployment compensation benefits in a fair, evenhanded manner.

Similarly, in *Monroe v. Standard Oil Co.,* 452 U.S. 549 (1981), the Court held that an employer was not required

to make work schedule accommodations for reservists, despite the provision of the Viet Nam Era Veterans' Readjustment Assistant Act, 38 U.S.C. §2001(b)(3), that prohibits denial of unemployment benefits because of reserve obligations. And, in May of this year, the Court handed down its decision in *Wygart v. Jackson Board of Education,* 476 U.S. ....., 90 L.Ed.2d 260 (No. 84-1340, decided May 19, 1986). In that case, the Board of Education had a hiring policy which included a goal to increase the percentage of minority teachers in the school district. Consistent with that policy, a provision was added to a collective bargaining agreement whereby if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority teachers laid off than the percentage of minority teachers employed at the time the layoff was commenced. Non-minority teachers, with more seniority than minority teachers not laid off, who were laid off, brought suit alleging violation of the equal protection clause. The Court determined that preferential layoff protection is impermissible under the Constitution. The position of Wimberly in this case would require Missouri to grant pregnant and formerly pregnant women preferential unemployment compensation protection.

The plain language of §3304(a)(12) clearly demonstrates an intention by Congress to deal only with the provisions of state laws which single out pregnancy or termination of pregnancy to the exclusion of all other considerations, alone, and unshared by other factors, because Congress spoke of laws which dealt "solely" with pregnancy. Because the plain language of the statute in question is consistent with the legislative history of the enactment and the interpretation given to the legislation by the federal agency responsible for its implementation, this Court should give meaning to all the words used by Congress, including the word "solely," to conclude that

Congress prohibited only presumptive disqualifications of pregnant and formerly pregnant women.

"One must not only listen attentively to what a statute says, one must also listen attentively to what it does not say."[17] Contrary to the position of Wimberly, §3304(a)(12) does not say that Missouri must grant unemployment compensation benefits to every woman who leaves her job because of pregnancy. The statute only prohibits Missouri from denying benefits "solely" because of pregnancy. In Missouri, a person is disqualified if he or she left his or her previous job for a reason not associated with the work place or the employer. It makes no difference whether the reason was pregnancy, some other good medical reason, or any good and sufficient reason. Missouri's policy is neutral with respect to pregnancy. It is not neutral with respect to the job-relatedness required for qualification for benefits. We must assume that Congress uses common words with their popular meaning as used in the common speech of man.[18] The words chosen by Congress indicate that only laws which single out pregnancy, solely, for special or discriminatory treatment are forbidden.

C.

The Legislative History Of §3304(a)(12) Supports The Conclusion That Congress Did Not Intend To Grant Pregnant And Formerly Pregnant Women Preferential Status With Respect To Unemployment Compensation Determinations.

> I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye.[19]

17. Mr. Justice Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum.L.Rev. 527, 536 (1947).

18. Frankfurter, *supra*, at 536.

It would be a simple matter if, in cases of statutory construction, the language of the statute itself was all that was required to be considered. As respondent, the Commission takes the firm position, as above explicated, that the plain language of the statutory section at issue mandates that the opinion of the court below be affirmed. That court, the Missouri Supreme Court, concluded that the plain language of §3304(a)(12) manifests an intent on the part of Congress to prohibit only presumptive disqualifications based on pregnancy. However, the plain language of the statutory section has been construed differently by others. Obviously, Wimberly suggests a different result. Likewise, the Fourth Circuit construed the plain language of the statute in a much different manner than does the Commission and as did the Missouri Supreme Court. *Brown v. Porcher,* 660 F.2d at 955.

Fortunately, such legislative history as exists with respect to §3304(a)(12) supports the position of the court below and not the position of the Fourth Circuit.

The federal statute at issue in this case was enacted in 1976 in the context of a U.S. Supreme Court decision in *Turner v. Department of Employment Security,* 423 U.S. 44, 46 L.Ed.2d 181 (1975), striking down a Utah state statute which expressly disqualified claimants during that period of time beginning 12 weeks before childbirth and continuing until six weeks after childbirth. S.Rep. No. 1265, 94th Cong., 1st Sess., 19-20 (1976). This ineligibility was imposed on claimants by state statute regardless of the conditions of the claimants' separation. *Turner v. Department of Employment Security, supra.*

The plaintiff in *Turner* had initially been receiving unemployment compensation benefits because she had been

19. Frankfurter, *supra*, at 529.

involuntarily separated from her employment for reasons unrelated to her pregnancy. However, twelve weeks before the expected date of childbirth, her compensation was terminated because the Utah state unemployment compensation laws imposed a general disqualification on pregnant women during that eighteen-week period. The Supreme Court found that the Utah statute's "conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid . . . ." *Id.* at 46, 46 L.Ed.2d at 184.

As a consequence of this decision, the U. S. Department of Labor advised state agencies to seek the removal of "state law provisions, interpretations, or policies [which] provide for disqualification or ineligibility of pregnant women for specified periods before expected date of childbirth and for specified periods after actual date of childbirth." C.C.H. *Unemploy. Ins. Rep.* ¶21482 (1976), U. S. Department of Labor, *Unemployment Insurance Program Letter* No. 1-76 [Addendum, *infra*, p. A-4]. The U. S. Department of Labor noted that the Court in *Turner* expressly reserved deciding the constitutionality of another Utah statutory provision which makes a woman ineligible for benefits "when it is found by the Commission that her total or partial unemployment is due to pregnancy." [Addendum, *infra*, p. A-5].

It is true that the proposal which was subsequently enacted as §3304(a)(12) was introduced into Congress before the Supreme Court decision in *Turner, supra.* With respect to the reasons for the initial introduction of the legislation, we agree entirely with the statement of the ACLU.

> The initial stimulus for the decision to include a pregnancy discrimination prohibition is not apparent in early reports of the bill. It is plausible that the members were acutely aware of the pervasiveness of sex discrimination, and in particular discrimination against pregnant workers and new mothers, from a series of decision from this Court, [citations omitted], and that the propriety of including such a prohibition seems so apparent that it did not require special mention. It may also be that the members of Congress were aware of the pendency of *Turner v. Department of Employment Security,* 423 U.S. 484 (1975) (*per curiam*), and were intending to address legislatively the problems raised in that case. Whatever the original impetus for including the pregnancy provision, after the opinion was rendered in the *Turner* case in November, 1975, *the rationale consistently proffered for the provision was that it would codify the result in Turner.* (Emphasis added.)[20]

The Senate Finance Committee Report on the bill acknowledged the *Turner* decision, which held unconstitutional "a conclusive presumption of incapacity" during the stated eighteen week period. S.Rep. No. 1265, *supra*, at 21-22. The Committee further noted that other states have similar provisions involving, however, "somewhat shorter periods of disqualification." *Id.* This bill, it stated,

> would prohibit states from continuing to enforce any provision which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). *Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.* (Emphasis added.)

It is apparent from this Senate Committee Report that the bill was intended first to eliminate the "somewhat shorter periods of disqualification" that some states, even after *Turner,* continued to impose. The question remains, though, concerning the further intent of the bill.

The House Ways and Means Committee Report explains the bill further. H.R. Rep. No. 755, 94th Cong., 1st Sess. It states:

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20. Brief of the American Civil Liberties Union, National Women's Political Caucus, and Coal Employment Project, as *amicus curiae*, pages 10-11.

> Nineteen states have special disqualification provisions pertaining to pregnancy. Several of these provisions hold pregnant women unable to work and unavailable for work; the remainder disqualify a claimant because she left work on account of her condition or because her unemployment is a result of pregnancy. H.R. Rep. No. 755, *supra*, at 7.
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> * * *
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> [This section would] provide that the unemployment compensation law of a State may not deny compensation to an individual solely on the basis of pregnancy or termination of pregnancy. *Supra*, at 60.

This Committee Report, which is dated December 16, 1975, does not name those nineteen states to which it is making reference. However, during the preceding week, the U. S. Department of Labor had released a report titled "Summary of Discriminatory State Provisions Relating to Pregnancy, Domestic and Marital Obligations, and Dependant's Allowances." C.C.H. *Unemp. Ins. Rep.*, ¶1996 (1976), U. S. Department of Labor, *Unemployment Insurance Program Letter*, No. 33-75 [Addendum, *infra*, p. A-6]. That report listed nineteen states that had discriminatory statutory or policy provisions relating to pregnancy and it described those offending provisions. Missouri was not listed as one of those nineteen states.[21] The inference is strong, therefore, that the federal statute at issue in this case was enacted to remedy a specific evil existing in those previously identified nineteen states.

A further review of the laws or policies in those offending nineteen states makes clear the meaning of the statutory prohibition on denial of benefits "solely on the basis of pregnancy." The laws in each of those states contained provisions according some special disqualification to, or special conditions for, pregnancy-related claims.

21. Actually, Missouri did have such a law until September, 1975. Section 288.040.5, Mo. Rev. Stat. 1969. However, Missouri was not on the list of nineteen states referred to by the House of Representatives and had already enacted a law to remedy the situation under consideration by Congress.

One group of states still had laws or regulations containing a presumption regarding a claimant's ability to work or availability for work during some stated period of time before or after childbirth.[22] Although these presumptions were probably unconstitutional in light of *Turner, supra*, and the Utah statute had been specifically struck down, nonetheless these laws or regulations were still unrepealed and these states could still be certified by the U. S. Secretary of Labor as conforming to federal law. 26 U.S.C. §3304(a).

Furthermore, two of those nineteen states expressly disqualified a claimant during any period of disability resulting from pregnancy.[23] One state's law disqualified a claimant for any week that she was unable to work or unavailable for work due to pregnancy.[24] Another large category of state laws contained special disqualifications for claimants who left work due to pregnancy.[25] Significantly, each of these states had no similar disqualification for claimants who were unemployed due to other medical reasons.

Two state statutes expressly imposed disqualifications on pregnancy-related claimants without addressing the eligibility of other health-related claimants.[26] And two

22. D.C. Code Ency., §46-310(h); Kan. Stat. Anno., §44-705(c); N.J. Stat. Anno., §43.21-4(c)(1); R.I. Regulations; Tex. Regulations; Utah Code Anno., §34-4-5(h).

23. Maryland Code Anno., Art. 95A, §6(f); Ore. Rev. Stats., §657.155(2).

24. Dela. Code Anno., §19-3315(8).

25. Ark. Stats., §81-1106(a); Colo. Rev. Stats., §8-73-108(4)(b)(I); Minn. Stat. Anno. (1977), §268.09; Ind. Stat. Anno., §22-4-15-1; Tenn. Code Anno. (1977), §50-1324(A); W.Va. Code Anno. (1978), §21A-6-3(1) and (8).

26. Mont. Rev. Code (1947), §87-106(i); Nev. U.C. Laws, §§612.435 and 612.440.

other state statutes contained other special procedures or conditions for pregnancy-related claims.[27] Each of these nineteen states had laws or regulations placing pregnancy-related claims in a special category separate from all other claims. Pregnancy was thus made the sole factor in determining whether a disqualification would be imposed and benefits denied.

Two of those laws were amended prior to 1978 in such a manner as to conform precisely to the practice of the State of Missouri, providing that determinations for pregnancy-related claims would be made in the same manner as determinations for all medically related claims. The Tennessee statute was amended to read:

> Pregnancy shall be considered in the same way as any other illness or disability within the meaning of this subsection. Tenn. Code Anno., §50-1324(A).

In like manner, the District of Columbia statute was amended to provide that

> [t]he eligibility of any individual who is or has recently been pregnant, for benefits under this chapter, shall be determined under the same standards and procedures as for any other claimant under this chapter. D.C. Code Ency., §46-310(h).

Thereafter, these two unemployment compensation laws were submitted to the U. S. Department of Labor and subsequently approved as conforming to the requirements of 26 U.S.C. §3304(a)(12). This construction of the federal statute by the Department of Labor is entitled to great weight, as discussed more fully below. We have been able to ascertain nothing in the legislative history of this enactment, nor has the petitioner pointed to any such history, which would indicate a congressional intent to prevent states from applying general disqualifications

27. Ala. Code, §25-4-78(2)(a)(4); Ohio Rev. Code Anno., §4141.29(d)(2)(c) and (G).

extending to a wide variety of reasons not related to employment. During congressional hearings, the Director of the Department of Labor's Office of Research, Legislation, and Program Policies, responding to questioning by Representatives Keys and Corman concerning sex discrimination in state unemployment compensation laws, described the primary problem as "the special provision for disqualification in cases of pregnancy which treats inability to work because of pregnancy * * * as different from any other kind of physical disability." Phase 1: Existing Unemployment Compensation Programs: Hearings Before the Subcom. on Unemployment Compensation of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 86-87 (1975).

According to Wimberly, apparently all women separated from work because of pregnancy would automatically receive benefits when they were physically able to work again. The sponsors of the bill did not understand this to be purport of the statute. Representative Steiger specifically stated:

> This does not mean that all pregnant unemployed women would automatically receive unemployment compensation benefits. It simply means that pregnant women will no longer be denied benefits solely on the basis of their pregnancy.
>
> If a pregnant woman is available for work, able to work, and cannot find a job, she ought to be treated no differently than any other unemployed individual available for work. That is what the provision in the bill seeks to accomplish.

122 Cong. Rec. 22, 518 (1976). Representative Corman, the author of the bill in question, stated "We are talking about disqualification of a worker because she has a physical condition that does not prevent her ability to work [i.e., an automatic disqualifier]." Hearings, Phase I, *supra*, at 87.

In her brief, Claimant has pointed out language from legislative history which indicates that Congress was concerned with persons able and available for work who were nevertheless denied benefits under the provisions of state laws. She suggests that because, after giving birth, she was able and available for work, congressional language supports the conclusion that she should not have been denied benefits under §3304(a)(12). Brief of Petitioner, p. 24. In the first place, it is clear from a thorough reading of the legislative history that Congress was concerned with presumptive disqualifications like the one at issue in *Turner*. Consistent with that concern, the legislative history available deals primarily with issues of eligibility. However, eligibility is not at issue in this case. Eligibility, that is being able and available for work, is one criteria states use to determine whether benefits should be paid. However, even if eligible, a claimant can be disqualified because he or she was fired for cause, for example, or, as in this case, because he or she left work voluntarily without a reason attributable to the work place. Whether Wimberly was able and available for work is not and has never been an issue in this case. The issue is whether Missouri may disqualify a person who left work for a reason not attributable to employment when such disqualification is applied to new mothers. A claimant who has been discharged for cause may be able and available to work, but is, nevertheless, disqualified. All the legislative history available demonstrates that Congress intended to require states to treat pregnant women and new mothers in a non-discriminatory manner, i.e., such persons are to be treated in the same way that all other unemployed persons are treated. That is what is done in Missouri.

Both Wimberly and the Missouri Supreme Court have referred to the fact that the original language introduced

into Congress for consideration is different from that finally enacted. The bill as originally drafted would have provided that:

> [n]o person shall be denied compensation under such State law solely on the basis of pregnancy and determinations under any provisions of such State law relating to voluntary terminations of employment, availability for work, active search for work, or refusal to accept work shall not be made in a manner which discriminates on the basis of pregnancy.[28]

The Missouri Supreme Court concluded that the language of this early act would have expressly authorized the result reached in *Brown v. Porcher* (Pet., A11). The petitioner, on the other hand, suggests that the original language would have expressly allowed Missouri to disqualify her. Brief of Petitioner, A19-20. We suggest that the original language, in more words and less precisely, provided for exactly the same result as the language finally enacted into law. The original language expressly referenced laws relating to voluntary terminations of employment, such as the law relied upon in this case to disqualify the Claimant. However, it would also have provided that determinations of eligibility or disqualification should not be made in such a way as to "discriminate" on the basis of pregnancy. We suggest the change in the statutory language from that originally introduced to that finally enacted indicates only a laudable ability of Congress to state clearly and concisely its purpose. In actual fact, the original language introduced stands as strong evidence that the final language enacted was meant only to assure that pregnant and formerly pregnant women will not be treated in a different manner than other applicants for benefits.

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28. H.R. 8366, 94th Cong., 1st Sess., §8(a) (1975); S. 2079, 94th Cong., 1st Sess., §8(a) (1975).

To the extent that this Court should depart from the language of the statute itself, to delve into the morass which some label legislative intent, the crux of the analysis must, in the words of Mr. Justice Cardozo, be ". . . which choice is it the more likely that Congress would have made?" *Burnet v. Guggenheim,* 288 U.S. 280, 285 (1933). The legislative history of this statutory enactment strongly suggests that Congress intended to stop the discriminatory treatment of pregnancy in state unemployment compensation decisions. It is extremely unlikely, in the absolute absence of any evidence to support such a conclusion, that Congress intended by the enactment of §3304(a)(12) to require the states to give preferential treatment to claimants who leave their work due to pregnancy. Missouri should not be required to alter its traditional approach on disqualification for leaving work due to medical or other good reasons unless it is clear that Congress intended such a result. The legislative history suggests that Congress did not intend that the basic structure of State eligibility and disqualification provisions be altered.

If Congress had intended that the basic structure with regard to a state disqualifying individuals who leave due to medical or other good reasons be changed to afford preferential treatment of pregnancy, §3304(a)(12) could have explicitly mandated preferential treatment as a condition to a state's receipt of federal funds. At the very least, there should be some suggestion of evidence on the record of legislative history surrounding such an enactment to support at least an inference that such an intent should be inferred. In the absence of a specific mandate, it should not be assumed, as petitioner does, that Congress meant to impose such a condition. *New York Telephone Co. v. N. Y. Dept. of Labor,* 440 U.S. 515, 537-538 (1979) (plurality opinion); *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 24 (1981).

D.

The United States Department Of Labor Has Consistently Interpreted §3304(a)(12) As Prohibiting Only Special Disqualifications Imposed Upon Pregnancy-Related Claims That Are Not Imposed On Other Claims, And As The Agency Present At And Involved In The Inception Of The Statutory Section, And As The Agency Which Is Required By Law To Enforce The Provisions Of The Section, The Interpretation Of The Department Of Labor Is Persuasive Evidence That The Opinion Of The Missouri Supreme Court Should Be Affirmed.

As indicated, *supra,* the Department of Labor was involved at the inception of §3304(a)(12). An official of the Department of Labor testified at the hearings on the bill. She specifically stated that the problem was

> The special provision for disqualifications in cases of pregnancy which treats inability to work because of pregnancy . . . as different from any other kind of physical disability.
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> * * *
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> [T]he ability to work of a pregnant woman should be considered on the same basis as the ability to work of any worker.[29]

This Court has consistently followed the rule that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Miller v. Youakin,* 440 U.S. 125, 144 (1979). In this case, the Department of Labor, which is charged with the execution of the statute in question, was present at the very inception of the legislation. As a result, the Department of Labor is in a special position to

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29. Phase 1: Existing Unemployment Compensation Programs: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 86-87 (1975).

construe the statute based not only on its duty to execute the provisions of the statute, as against the states, but upon its knowledge of and participation in the deliberations and expressed intent of Congress in enacting the provision into law. See also *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 431 (1975).

The Department of Labor has consistently supported a construction and interpretation of §3304(a)(12) which is consistent with the decision reached by the court below; in fact, the court below, in reaching its conclusion, was considerably influenced by the fact that the agency entrusted by Congress with the administration of the statute had announced a position consistent with that of the Commission (Pet., A12).

Shortly after the enactment of the federal statute, the Department of Labor commented as follows:

> The new provision requires that the entitlement to benefits of pregnant claimants be determined on the same basis and under the same provisions applicable to all other claimants. It does not mean that pregnant claimants are entitled to benefits without meeting the requirements of the law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy, but on the basis of whether she meets the statute's conditions for receipt of benefits.[30]

It is also important to note that the Department of Labor has continued to certify the Missouri unemployment program as complying with all federal minimum requirements, which requirements include that provided for in §3304(a)(12).

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30. U. S. Dept. of Labor, Employment, and Training Administration Unemployment Insurance Service, "Draft Language Commentary to Implement the Unemployment Compensation Amendments of 1976 - Public Law 94-566," at 62.

Furthermore, the Department of Labor specifically stated its position with respect to the validity of a statute and policy like that in Missouri when it sent a letter to South Carolina when that state was involved in the *Brown v. Porcher* litigation. It is important to note that the South Carolina statute, as interpreted by the officials of that state, was indistinguishable in practical effect from the statute and policy in Missouri. With respect to such a statute and policy, the Department of Labor stated as follows:

> [Section 3304(a)(12)] has been interpreted to require that the entitlement to benefits be determined on the same basis and under the same provisions applicable to all other claimants. It does not mean that pregnant claimants are entitled to benefits without meeting the usual requirements of the State law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether the claimant meets the State statute's requirements for receipt of benefits.[31]

Finally, it is clear that the Department of Labor and the United States still hold the view that §3304(a)(12) does not prohibit the state practice which resulted in the disqualification from benefits of Wimberly. In his Memorandum for the United States as *Amicus Curiae*, the Solicitor General in this case, expressed the view that the Missouri Supreme Court's decision is correct.

The contemporaneous and consistent construction and interpretation of §3304(a)(12) by the United States Department of Labor is entitled to judicial respect and deference. *Chevron v. National Resources Defense Council*, 467 U.S. ....., 81 L.Ed.2d 694 (1983).

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31. Brief for the United States as *Amicus Curiae* in *Porcher v. Brown*, No. 81-1972 (October Term 1982), at page 12-13.

II.

Sound Considerations Of Public Policy, Including The Principles That Pregnant Women Should Not Be Granted Preferential Status Over Other Claimants Who Left Their Employment For Good, But Not Job-Related, Reasons, That Discrimination In Favor Of Pregnant Women Is As Dangerous As Any Sex-Specific Discrimination, And That Acceptance Of Petitioner's Position Would Create A Sex- And Pregnancy-Specific Welfare/Public Health Insurance Program, Dictate That The Court Below Should Be Affirmed.

Analysis of the meaning of §3304(a)(12) using such standard tools of statutory construction as the context in which the statute was enacted, the plain language of the statute, the legislative history of the enactment, and the interpretation of the statute by the federal agency in charge of its implementation, suggests that Congress did not intend to legislate a law which would require the states to give a discriminatory preference in favor of pregnant and formerly pregnant applicants for unemployment compensation insurance. That being the case, the inquiry of the Court should be finished. It is traditional to our governmental system that the judiciary should be sensitive to the line between adjudication and legislation.[32] Nevertheless, in Point III of her brief, the petitioner expounds at some length, suggesting, in effect, that this Court should legislate a result which the petitioner apparently believes would be salubrious.

In response to the position of the Claimant, we suggest that there are sound and compelling public policy considerations which gravitate toward a result in this case which is consistent with what the statutory construction of §3304(a)(12) dictates. We agree with the words of Mr.

32. Mr. Justice Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum.L.Rev. 527, 539 (1947).

Justice Cardozo, speaking to the need for judicial restraint in statutory construction:

> We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it.

Anderson v. Wilson, 289 U.S. 20, 27 (1933). We do, however, intend to apprise the Court of those public policy considerations which are consistent with our position.

In Missouri, a person is disqualified from receipt of unemployment compensation benefits, at least until he or she has earned credit by going back to work for a specified period of time, if that person left his or her previous employment for a reason, or reasons, which is not attributable to the work or to the employer. The only relevant issue to the administrative determinations mandated in the Missouri statute and procedure is whether the reason for the applicant having left work is job-related. Leaving work because of pregnancy is not job-related. The work place does not participate in the process of conception. Similarly, a person involved in an automobile accident during nonworking hours, a person who falls from a ladder while painting his or her house, a person who is injured in a collision at home plate while playing softball does not, if compelled to leave the work place, leave his or her job for reasons which will qualify for compensation. Missouri does disqualify a large number of employees whose separation from work may be justifiable, but is not attributable to the work place or to the employer. If such across-the-board disqualifications, for medical and other good reasons, are believed not to be desirable, that is a matter to be remedied by Congress. That situation is presently being considered by Congress. *See* The Parental and Medical Leave Act of 1986, H.R. 4300 and S. 2278.

We submit, however, that the State of Missouri has made a rational decision by choosing to disqualify claim-

ants for benefits who leave their work for reasons not causally connected to their job, no matter how legitimate and necessary their leaving work may have been. Such a policy is consistent with the original purpose of F.U.T.A. to provide a genuine unemployment compensation system as opposed to a mere welfare program.[33] The compensation paid through an unemployment compensation system is funded through taxes on employers. Why should employers pay compensation to persons who have left the work place for purely personal reasons? The taxes levied against employers should be spent to assist persons temporarily out of work due to the economics of the job market and conditions prevalent in the work force. Such taxes should not be spent to compensate persons who have left the work force for reasons having nothing whatsoever to do with the businesses operated by employers.

We also agree with the ACLU that "[g]iven the potential for pregnancy-based distinctions to deprive women of the concrete benefits granted others in similar situations, such an intent should not be lightly inferred."[34] Any kind of sex or child-bearing discrimination is dangerous to society, whether that discrimination in the specific case would appear to favor or disfavor women and mothers. When the Department of Labor provided information to state unemployment compensation administrators concerning the implementation of §3304(a)(12), it considered expressly the problems inherent in discriminating in favor of pregnant or formerly pregnant claimants. Providing its own answer of whether the statute prohibits the treating of pregnant claimants more favorably than other claimants, the Department of Labor stated:

> No issue under 3304(a)(12) would be raised if a state chooses to treat pregnant claimants more favorably

33. Sen. Rep. No. 628, 74th Cong., 1st Sess., at 13 (1935).

34. Brief of the American Civil Liberties Union, et al., as amici curiae, page 3.

> than other claimants, *but it seems likely that more favorable treatment of a specific class of women might well raise other issues grounded on discrimination.*[35]

Discrimination is bad public policy, and it should not be assumed that Congress intended to require the states to embark upon a discriminatory program as it relates to pregnancy. In fact, a preference or discriminatory system, pregnancy-based, constitutes unlawful discrimination under the standards set out in *Geduldig v. Aiello,* 417 U.S. 484. Such an interpretation of §3304(a)(12) would also conflict with the clearly expressed intent of Congress in Title VII to assure only that women affected by pregnancy "be treated the same as other persons not so affected but similar in their ability or disability to work . . . ." Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (1982).

In Missouri, pregnancy is treated exactly the same as other temporarily incapacitating illnesses. At page 26 of her brief, Wimberly argues that, in essence, there is something fundamentally unsound in treating all non-job-related physical disabilities, to include pregnancy, in the same manner. Contrary to the position of the Claimant, the federal government and Congress have often considered pregnancy and illness as analogous. Since 1972, for example, Equal Employment Opportunity Commission guidelines have drawn an analogy between pregnancy and illness. 29 C.F.R. §1604.10 (1984). Also, the Pregnancy Discrimination Act of 1978 incorporates within its provisions the correlation between illness and pregnancy. 42 U.S.C. §2000e(k) (1982). Pregnancy cannot be wholly divorced from other kinds of illness if people in the work force are to be treated evenhandedly. Certainly, Missouri has not been unreasonable in treating leaving work due to

35. U. S. Department of Labor Employment and Training Admin., Unemployment Insurance Service, "Supplement #1 - Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - P.L. 94-566,*" (12/7/76 at 26).

pregnancy in the same manner as it treats leaving work due to other good medical reasons.

If, as petitioner argues, Congress did intend to create a preference in favor of pregnant women and recent mothers, such intention would have grave consequences under the equal protection clause. *Reed v. Reed,* 404 U.S. 71, 76 (1971); *Orr v. Orr,* 440 U.S. 258 (1979), *on remand,* 374 So.2d 895, *writ den'd,* 374 So.2d 898, *appeal dismissed, cert. den'd,* 100 S.Ct. 993; *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979) (*on remand, Feeney v. Commonwealth of Massachusetts,* 475 F.Supp. 109, *aff'd,* 100 S.Ct. 1075; *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982). In *Orr v. Orr, supra,* for example, Alabama law provided that husbands but not wives may be required to pay alimony. In other words, Alabama statute and practice was to provide a discriminatory preference in favor of women, just as plaintiff would have the Court to do in this case. This Court stated as follows:

> Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the States' compensatory and ameliorative purposes are as well served by gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

Id. at 283.

In *Personnel Administrator of Mass. v. Feeney, supra,* the Court was confronted with an argument very similar to that made by the claimant in this case. That case concerned a Massachusetts statute granting a veteran's preference for public employment. Female plaintiffs challenged the statute on the basis that it had a disparate and adverse impact on women. Similarly, petitioner has challenged the statute and practice in Missouri which she claims has an adverse effect on pregnant women. Using equal protection

analysis, the Court upheld the validity of the Massachusetts statute, finding that it was gender-neutral.

Although the present case is one involving statutory construction, the important and difficult constitutional questions which would be raised by the adoption of Wimberly's position should not be overlooked. Gender-based discrimination is suspect *per se.* It should not be lightly inferred that Congress intended the enactment of §3304(a)(12) to create a special class of unemployment compensation benefactors composed solely of pregnant and formerly pregnant claimants.

The interpretation of the statute urged upon the Court by the petitioner would impinge upon compensation decisions regarding eligibility criteria, disqualifications and like subjects which have traditionally been left to the states. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 483-484 (1977). We submit that it is in the public interest for determinations of that nature to remain within the province of the states. Especially in a case where the state statute in question is neutral with respect to gender and the nature of a claimant's incapacity to work, individual decisions concerning whether particular claimants are eligible for or are disqualified from benefits are decisions properly left to the officials of the State of Missouri.

The disposition by the court below of the issue presented by this case is legally valid, and the contrary position taken by the Fourth Circuit in *Brown v. Porcher, supra,* is incorrect. A proper construction and interpretation of §3304(a)(12) indicates that Congress did not intend to single out women who have left their jobs to have children, and who are not reinstated by their employers thereafter, for special preferential treatment with respect to eligibility for unemployment compensation benefits. Section 288.050.1(1), Mo. Rev. Stat. (1978), as interpreted and applied by the state courts of Missouri, including the

court below, is neutral as it relates to sex and pregnancy. If any otherwise eligible Missouri worker, male, female, or neuter, leaves a job for a cause not attributable to the work or the employer, whether that cause be good, bad, or indifferent, such a worker is disqualified from unemployment compensation benefits. Pregnant women and recent mothers are not singled out for differential treatment in Missouri. Public policy considerations support a rational construction of §3304(a)(12) which would vindicate the practice and procedure of the respondents under Missouri law.

CONCLUSION

The judgment of the Missouri Supreme Court, interpreting and construing 26 U.S.C. §3304(a)(12), should be affirmed.

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REPLY

BRIEF

No. 85-129

In the Supreme Court of the United States

OCTOBER TERM, 1986

LINDA WIMBERLY,
Petitioner,

vs.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR PETITIONER

Petitioner files this Reply Brief to address the points raised by the respondents (hereinafter the "Commission") in their Brief and by the Solicitor General in his Brief for the United States as Amicus Curiae.

The Commission suggests that a favorable decision for Mrs. Wimberly would create a social welfare system giving preference to pregnant and formerly pregnant women. (Commission's Brief (hereinafter "Comm. Br.") pp. 17, 20-21, 44-46). Such a conclusion is ill-founded. Welfare connotes the provision of unearned benefits. Mrs. Wimberly earned her unemployment compensation. She worked for her former employer, J.C. Penney Co., Inc., for three years before she became pregnant and was denied rein-

statement in her job. Mrs. Wimberly is not seeking welfare, nor is she asking for compensation when unable or unwilling to work; rather, she is seeking insurance payments to which she is entitled while actively seeking employment.

The Commission emphasizes that the unemployment compensation system is to assist individuals while they are temporarily out of work and whose unemployment is truly connected with the work place and the economics of work conditions and availability. (Comm. Br. 20). Mrs. Wimberly became temporarily unemployed when her employer decided not to reinstate her. Her unemployment was a product of the employer's policies, the economic conditions at the time and the availability of work. Her case is precisely the type of case for which the unemployment compensation system was created—an employee who wants to work but cannot work due to the economic conditions at the time of her unemployment.

The Commission warns against causing Congress to enter a field left to the states, "namely, individual determinations of eligibility and disqualification . . . ." (Comm. Br. 21). But Congress has often legislated in the area of unemployment insurance "disqualifiers." Section 3304 (a)(12) is not the only congressional prohibition of disqualifications. Title 26 U.S.C. § 3304(a) contains three other provisions limiting grounds for disqualification from payment of unemployment benefits. Subsection (5) prohibits disqualification of persons refusing to work in anti-union shops or substandard places of employment. Subsection (8) bans disqualification of persons participating in approved job training programs. Subsection (9) prohibits disqualification due to state of residence or application. Conversely, Congress has also imposed mandatory

disqualifications in certain instances: of teachers during summer recess [(a)(6)]; of professional athletes during their off-season [(a)(13)]; and of foreign nationals lacking work permits [(a)(14)]. Clearly, Congress has prohibited some "disqualifiers" and required others. Despite the state-run nature of the unemployment compensation system, mandatory federal fundamental standards governing disqualifications exist and cannot be circumvented.

The Solicitor General also devotes attention to the discretion that states are accorded in the unemployment compensation system.[1] The system is largely left to the discretion of the states; however, no discretion is granted to the states in following federal fundamental standards. None of the examples cited by the Solicitor General concerning disqualifications of persons who are involuntarily unemployed involve a fundamental standard imposed by Congress. (S.G. Br. 23 n.25).

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1. The Solicitor General additionally makes repeated references to the need to protect the fiscal integrity of the state unemployment insurance programs and to avoid increased costs to the states. (Solicitor General Brief (hereinafter "S.G. Br.") pp. 23-24). But an interpretation of section 3304(a)(12) that provides for the award of benefits to Mrs. Wimberly would not cause the state to expend its own funds. The unemployment compensation fund from which benefits are paid is not part of the state treasury. It is a special insurance trust fund which is always maintained "separate and apart from all public moneys or funds" of the state. Rev. Stat. Mo. § 288.290.1 (Supp. 1986). It is composed of money collected from employers by the State of Missouri which is promptly remitted to the United States Treasury and held for use solely for unemployment insurance. *Id.*; 42 U.S.C. §§ 503(a)(4) (1982 & Supp. II 1984 & Supp. III 1985), 1103(c) (1982), 1104(a) (1982).

Moreover, by law, benefits are deemed to be "due and payable only to the extent that moneys are available to the credit of the unemployment compensation fund and neither the state nor the division shall be liable for any amount in excess of such sums." Rev. Stat. Mo. § 288.330.1 (Supp. 1986). The state treasury, therefore, is completely insulated from payment of any claims against the fund including those involved in the payment of benefits to Mrs. Wimberly.

Similarly, the case cited by the Solicitor General, *Watkins v. Cantrell,* 736 F.2d 933, 939 (4th Cir. 1984), as evidence of the states' latitude does not authorize discretion on the part of states to ignore a fundamental standard. That case is an example of a state exceeding the requirements of a fundamental standard. States can expand on a fundamental standard, but they cannot elect to conduct their programs in conflict with such a standard.

In quoting the Solicitor General, the Commission cautions against requiring the states to alter their traditional approaches to disqualification. (Comm. Br. 20-21). However, the historical conclusive presumptions of unavailability for work and inability to work of pregnant women and new mothers were traditionally applied by many states to deny benefits, and all parties agree that section 3304 (a) (12) was enacted to eradicate these disqualifications. Congress can and does alter traditional approaches to disqualifications when necessary. In section 3304(a)(12) Congress went beyond eradicating conclusive presumptions and banned any other type of pregnancy-related disqualification of otherwise eligible women.[2]

The Solicitor General agrees that section 3304(a)(12) was enacted to eliminate two kinds of statutes that disqualified claimants for pregnancy-related reasons: those

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2. One contention of the Solicitor General is that because there was no testimony at the hearings on section 3304(a)(12) which indicated disagreement with state provisions that "neutrally disqualified workers who leave their jobs for reasons unrelated to unemployment," Congress did not intend to alter state practices that treat pregnancy as a voluntary quit. (S.G. Br. 16). Conversely, there was no testimony which sanctioned such a practice. Had Congress been aware that states would circumvent the purpose of section 3304(a)(12) by treating pregnancy as a voluntary quit, such a practice may have been explicitly prohibited; however, the broad expansive language chosen by Congress encompasses such a practice thereby making a specific reference unnecessary.

that "automatically disqualified women from receiving compensation for a period before and after childbirth . . ." and those that disqualified "women leaving work on account of pregnancy." (S.G. Br. 6-7). Presumably, the Commission and the Solicitor General would also agree that a state could not pass a statute which says that a leaving of work due to pregnancy will be deemed a voluntary quit thereby disqualifying an otherwise eligible claimant. It would be incongruous for Congress to prohibit these explicit statutes while permitting states to construct ways, such as the use of "neutral statutes," to continue the prohibited practices.

The Solicitor General and the Commission alter the meaning of section 3304(a)(12) by maintaining that Mrs. Wimberly's interpretation focuses on a claimant's motivation for leaving employment rather than the state's basis for denying benefits. (S.G. Br. 11, Comm. Br. 26). The basis for her denial by the state was that she "quit because of pregnancy." (Pet. App. A53). Her pregnancy was the basis for her denial, and no distortion of the statutory language can change that fact.

The Commission contends that Missouri's work-relatedness requirement for good cause to voluntarily quit allows Missouri to escape the "solely" requirement of section 3304(a)(12) when it denies benefits to workers like Mrs. Wimberly. But Congress could not have intended such a result. Nearly every pregnant worker will eventually stop working because some demand of the job makes it physically impossible to continue. But if Missouri's work-relatedness rule is read to require more direct connection between the work and the condition of pregnancy, i.e., that the work caused the pregnancy, then virtually no pregnant worker could meet the requirement. In the

one case almost every pregnant worker would qualify for benefits if eligible, and in the other nearly every pregnant woman would not qualify. The Commission maintains that some pregnant workers could qualify in Missouri if their physical conditions are aggravated by the work conditions. (Comm. Br. 27 n.16). This proposition, however, is unsupported by any authority, undoubtedly because Missouri has repeatedly denied benefits in such cases.[3] Thus Missouri's purported reliance on the work-relatedness requirement to defeat the "solely" condition of section 3304(a)(12) is a subterfuge to avoid paying benefits to pregnant workers who leave work solely because of their pregnancies. It is exactly this kind of attempt to arbitrarily deny benefits to pregnant workers that Congress sought to prohibit by the enactment of section 3304(a)(12).

The Commission and the Solicitor General rely heavily on *Southeastern Community College v. Davis,* 442 U.S. 397 (1979) to support their position that the use of the word "solely" in section 3304(a)(12) indicates that Congress intended to prohibit discrimination and did not intend to require "affirmative action" toward women. (Comm. Br. 27, S.G. Br. 13). However, in *Davis,* this Court was interpreting section 504 of the Rehabilitation

3. E.g. *Karen Reynolds* App. No. 85-11116 (Mo. Div. Emp. Sec. 1985) (Doctor advised her not to work around chemical fumes; no alternative job or leave provided by employer; disqualified for voluntary quit). App. A. A1-A3; *Gina M. Graves* App. No. 85-13085 (Mo. Div. Emp. Sec. 1985) (Doctor advised her not to lift more than 20 pounds and to elevate her feet if experiencing abdominal cramping; employer could not accommodate her and she had to leave her job; disqualified for voluntary quit). App. B. A4-A6; *Sheryl Farley* App. No. 84-13311 (Mo. Div. Emp. Sec. 1984) (Due to swollen feet aggravated by continuous standing at her job, she first took frequent breaks (under doctor's advice), reduced the number of hours worked and ultimately had to leave; request for leave denied by employer; disqualified for voluntary quit). App. C. A7-A9.

Act of 1973, 29 U.S.C. § 794. That section provides as follows:

> § 794. *Nondiscrimination* under Federal grants and programs; promulgation of rules and regulations
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to *discrimination* under any program or activity receiving Federal financial assistance. . . . (Emphasis added).

The word "discrimination"[4] is used by Congress in both the heading and body of this section to make clear its intent to prohibit discrimination. That or a similar term was consciously omitted by Congress in section 3304(a)(12). *See* Pet. Br. 19-20.

Moreover, in *Davis,* the Court did not discuss the meaning of the word "solely." Instead it concentrated on the phrase "otherwise qualified handicapped individual" and held that the phrase meant qualified in spite of a handicap (not except for a handicap). *Id.* at 406. The plaintiff in that case did not possess the physical qualifications for admission to a clinical training program. Linda Wimberly on the other hand, was fully eligible (able to work and available for work) for unemployment compensation. The only reason for her disqualification was that she left her job due to pregnancy.

The Commission and the Solicitor General also cite *Monroe v. Standard Oil Co.,* 452 U.S. 549 (1981) as sup-

4. The use of the word "discrimination" in section 504 connotes disadvantageous treatment. Thus the use of that term with "solely" creates an understandable interpretation that the handicapped may not be disadvantaged.

portive of their interpretation of section 3304(a)(12). In *Monroe,* a military reservist sued his employer under 38 U.S.C. § 2021(b)(3) for failing to pay him for hours he did not work (due to reserve duties) and for refusing to reschedule missed work time. The statute provides that any employee of a private employer "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces."[5] The wording of the statute was not similar to section 3304(a)(12).

This Court found that the real purpose of the statute was to protect the reservist employee from discharge and demotion or other comparable adverse treatment motivated by his reserve status. *Id.* at 562. Schedule accommodations and pay for hours not worked were held not to fall in the same category as discharge and demotion. In the instant case, Mrs. Wimberly has not suffered merely a failure of accommodation in the process of her unemployment compensation claim. Rather, she has been declared disqualified for *any* benefits on the basis that she left her job due to pregnancy. Such a disqualification is exactly what Congress intended to prohibit by enacting section 3304(a)(12) and would be comparable to the prohibition of a discharge referred to in 38 U.S.C. § 2021(b)(3).

The Solicitor General expresses confusion over how Mrs. Wimberly can propose that the plain language of section 3304(a)(12) leaves a state free to deny benefits to women who are unable to work or unavailable for work. (S.G. Br. 12). Such confusion is unwarranted.

5. The Commission states that this statute prohibits the denial of unemployment benefits because of reserve duties, but neither the case nor the statute refers to unemployment benefits. (Comm. Br. 29).

First, the plain language addresses only disqualification. It does not speak to eligibility. Therefore, the eligibility provisions of state law would apply to a particular claimant. Second, as the Solicitor General acknowledges, the legislative history of section 3304(a)(12) is very clear that only *otherwise eligible* (meaning able to work and available for work) claimants would be qualified for benefits. (S.G. Br. 12 n.12).

The Commission and the Solicitor General argue repeatedly that section 3304(a)(12) was not intended by Congress to require preferential treatment of pregnant workers. But it is only in the very few states like Missouri that pregnant workers would arguably be given more favorable treatment than some other similarly classified workers, and that is so only if nonpregnant workers who are temporarily disabled through no job connection are considered to be similarly situated. The more appropriate class of workers to which to compare pregnant workers is all those who are forced to leave work through no fault of their own.[6] Accordingly, section 3304(a)(12) would compel treating pregnant workers no more favorably than most workers in the class (such as those who are laid off). If a woman leaves work before compelled

6. The Commission quotes Representative Steiger as stating that all pregnant unemployed women would not automatically receive benefits. (Comm. Br. 37). But this does not mean that they would only get benefits if ill people were treated the same. Rather it means that Representative Steiger and the rest of Congress intended that a pregnant or formerly pregnant woman should receive benefits if she is otherwise eligible. Representative Steiger's statement that "she ought to be treated no differently than *any other unemployed* individual available for work" meant that the treatment should be similar with regard to the eligibility of the claimants and that pregnancy-related claims be treated the same as those of this larger class of qualified claimants who were forced to leave their jobs through no fault of their own. (Emphasis added). This was the intended meaning of other similar references in the legislative history.

to by the condition of her pregnancy, she will have voluntarily quit and will be disqualified. She will also be lawfully disqualified if she is terminated for misconduct.

The Commission suggests that in the "absence of a specific mandate," it cannot be assumed that Congress meant to prohibit pregnancy-related disqualifications if a state has similar illness-related disqualifications. (Comm. Br. 40). Such an argument totally disregards the very specific mandatory language of section 3304(a)(12). Congress expressly mandated against pregnancy-related disqualifications; it did not address illness-related disqualifications either in the statute or its legislative history.

In the Department of Labor "Summary of Discriminatory State Provisions Relating to Pregnancy . . ." the agency lists nineteen states that it concluded had provisions that discriminate on the basis of sex. Unemployment Insurance Program Letter No. 33-75, Unemp. Ins. Rep. (CCH) ¶21,482 (1976). However, no comparison is made between the different states' treatment of disability and pregnancy. In fact, disability disqualifications are rarely mentioned in the Summary. This Summary is the source of the information provided by the Commission regarding the nineteen states that had statutory disqualifications pertaining to pregnancy. (Comm. Br. 34-36, *see also* Pet. Br. 23).

In referring to these nineteen states the Commission recognizes that six states had laws that specifically disqualified claimants (like Mrs. Wimberly) who left work because of pregnancy. (Comm. Br. 35). The Commission claims that all of these nineteen states lacked similar disqualifications for claimants who left work due to other medical reasons and infers that the different treatment of pregnancy and disability was the primary concern of Congress. (Comm. Br. 35-36). The Commission's observations fail on two counts.

First, nothing in the legislative history indicates that Congress was concerned about the states' treatment of disability disqualifications. The only references made by Congress to disability pertain to the ability of claimants to work—an eligibility question, not a comparison of disqualifications. Additionally, as noted, the information provided by the Department of Labor did not contain a comparison of pregnancy and disability disqualifications.

Second, at least two of the states referred to by the Commission did have similar disqualifications for disability and did not create a special category for pregnancy. In Oregon, for example, Ore. Rev. Stats. § 657.150(2) (1975)[7] provided that:

> An individual who leaves work because of a *disability such as illness, injury, or pregnancy* shall be presumed unable to work until the administrator determines that the individual is able to work as required by paragraph (c) of subsection (1) of this section. (Emphasis added).

Pregnancy was treated the same as disability in Oregon at the time that Congress considered Oregon to be one of the nineteen states that had a special disqualification pertaining to pregnancy.

In Arkansas, claimants who left their work due to pregnancy or disability were disqualified until they had worked and been paid for thirty days. Ark. Stats. § 81-1106(a) (1976). The only distinction made between the two types of disqualifications was that the formerly pregnant claimant would not be disqualified if she obtained a leave of absence and was not reinstated at the

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7. The Department of Labor Summary and the Commission incorrectly cite this statute as § 657.155(2) although the language of the statute is correctly quoted in the Summary.

end of her leave. The formerly disabled claimant would not be disqualified if he or she made reasonable efforts to preserve the job. This would include obtaining a leave of absence and being denied reinstatement. The treatment of both claimants was very similar, yet Arkansas was viewed as a state that disqualified women for pregnancy-related reasons. It was the existence of disqualifications relating to pregnancy and not any supposed dissimilar treatment of pregnancy and disability that triggered Congress' enactment of section 3304(a)(12).

The Solicitor General asserts that the Department of Labor has been consistent in its interpretation of section 3304(a)(12). But its consistency concerning the precise issue of this case is questionable.[8] Prior to the enactment of the statute, the Department of Labor condemned the disqualification of a woman when it was found that her "total or partial unemployment is due to pregnancy." Unemployment Insurance Program Letter No. 1-76, Unemploy. Ins. Rep. (CCH) ¶21,482 (1976). If the agency is now saying that such disqualifications are appropriate, it is inconsistent and erroneous.

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8. On two occasions, the Commission quotes the same testimony of the Department of Labor presented at certain hearings on the F.U.T.A. Amendments. (Comm. Br. 37, 41). This testimony is offered as evidence of congressional intent to merely require states to treat pregnancy as a disability. In light of legislative history, this testimony more likely reflected the agency's concern about the ability to work and availability for work of pregnant and formerly pregnant claimants. The emphasis is on the eligibility of claimants and not the similar treatment of the disqualification.

The agency's past certification of Missouri does not establish either a consistent interpretation of the statute or the state's compliance with the law. The Solicitor General admits that certification of a state as complying with the federal standards does not "constitute affirmative approval of all practices followed by a state." (S.G. Br. 26 n.29). He recognizes that the Department of Labor may not always discover noncompliance of a state with its laws. (S.G. Br. 28-29 n.32).

This Court has stated that although an agency's interpretation of a statute under which it operates is entitled to some deference,[9] "this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

If the Department's current interpretation can be read to exclude the provision of benefits to women in Mrs. Wimberly's position, then its interpretation is wrong and in conflict with the language, purpose and legislative history of section 3304(a)(12). An agency's interpretation will not be upheld if there are indications that it is "plainly erroneous," *United States v. Larionoff*, 431 U.S. 864, 872 (1977), or inconsistent with congressional intent or policy. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

The Commission and the Solicitor General cite *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) as authority for this Court to defer to the Department of Labor's interpretation of section 3304(a)(12). (Comm. Br. 43, S.G. Br. 24). However, *Chevron* only allows such deference if the statute is silent or ambiguous with respect to the specific issue and if the agency interpretation is based on a permissible construction of the statute. *Id.* The Department of Labor interpretation promoted by the Commission and Solicitor General is not a permissible, reasonable interpretation of section 3304(a)(12).

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9. The authority of the Unemployment Insurance Service (S.G. Br. 25 n.27) to officially speak for the Department of Labor in matters of statutory construction is questionable. There is no such statutory authority, and the Solicitor General has cited no other delegation of authority from the Secretary. There has thus been no official interpretation by the Department of section 3304(a)(12), and any pronouncements by the U.I.S. are not entitled to the same deference. *See Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 48 (2nd Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977).

It strains reason to believe that Congress would have prohibited conclusive presumptions concerning the availability for work and ability to work of pregnant claimants while allowing presumptions that treat a leaving of work due to pregnancy as a voluntary quit. Congress was fully aware of both unfair disqualifications and would not have intended to eliminate only one type. Additionally, section 3304(a)(12) is not silent or ambiguous on the specific issue in this case. The language clearly prohibits pregnancy-related disqualifications of any kind.

Moreover, in *Chevron*, the Court was asked to review Environmental Protection Agency (EPA) regulations that implemented certain provisions of the Clean Air Act Amendments of 1977. The EPA was interpreting a statute which concerned very specific air quality standards. The interpretation of the statute and the promulgation of implementing regulations involved highly technical expertise and knowledge possessed by the EPA. A reviewing court, however, should give less deference to an agency's interpretation of statutory language if the construction of that language does not require technical experience or expertise peculiar to the charged agency. *See Town of Brookline v. Gorsuch*, 667 F.2d 215, 220 (1st Cir. 1981); *Brennan v. General Tel. Co.*, 488 F.2d 157, 160 (5th Cir. 1973). No technical experience or expertise is necessary in analyzing the intent and meaning of section 3304(a)(12). The statute does not involve any technical terms or standards of which the Department of Labor would have special knowledge.

More importantly, the construction of statutes and other laws is a matter which ultimately belongs to the courts. *See Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) and *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944). In the end, the "courts are the final authorities on issues of statutory construction.

They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *F.E.C. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). A narrow Department of Labor interpretation that confines itself to banning conclusive presumptions regarding pregnancy totally frustrates the broad intent of Congress to eradicate pregnancy-related disqualifications affecting otherwise eligible women.

The Commission claims that the federal government and Congress "have often considered pregnancy and illness as analogous." (Comm. Br. 47). But only one area of the law is cited as comparing the two groups. That is Title VII and the Pregnancy Discrimination Act of 1978. 42 U.S.C. § 2000e(k) (1982). Section 3304(a)(12) cannot be compared to Title VII.[10] They are distinctly different statutes with distinctly different language and purposes. Title VII covers many aspects and conditions of employment, but section 3304(a)(12) covers only one area of employment. The burden on the employer in section 3304(a)(12) is much more limited than it is in Title VII.[11] The appropriate comparison here is one of section 3304(a)(12) with the United States Constitution, not with

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10. The Commission finds it hard to believe that Congress would have intended pregnant women to enjoy the same rights as disabled people when they are on the job and more rights once they are unemployed. (Comm. Br. 22). But unemployment is a much greater hardship than problems one experiences in employment, and Congress wanted to eliminate this hardship for pregnant women in a way that creates the least amount of burden to an employer.

11. The American Civil Liberties Union (A.C.L.U.) also submitted an amicus curiae brief in this case. On p. 24 of its brief, the A.C.L.U. attempts to connect section 3304(a)(12) with Title VII. The denial of unemployment compensation benefits is not covered by Title VII. *See Vick v. Texas Employment Comm'n*, 514 F.2d 734, 736 (5th Cir. 1975) and *Greene v. Johns*

(Continued on following page)

Title VII. As the forthcoming analysis will reveal, section 3304(a)(12) does not conflict with the Constitution.

According to the Commission, Mrs. Wimberly's interpretation of section 3304(a)(12) would create a violation of the equal protection component of the Fifth Amendment (referred to as the "equal protection clause" in the Commission's Brief) and Congress, therefore, would not have intended such a result.[12] (Comm. Br. 48). However, Congress can pass legislation that includes or excludes pregnancy on any reasonable basis. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974). In *Geduldig*, this Court held that a classification based on pregnancy is not necessarily a sex-based classification and that absent a showing that "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis. . . ." *Id.*

This Court went on to find that a classification based on pregnancy does not involve gender but rather a classi-

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Footnote continued—

Hopkins University, 469 F. Supp. 187, 199 (D. Md. 1979). The A.C.L.U. asks this Court to remand this case for a determination as to whether or not J.C. Penney Co., Inc., discriminated against Mrs. Wimberly by denying her reinstatement. Consequently, the remedy proposed by the A.C.L.U. necessitates a finding by this Court that Title VII applies to this case. Mrs. Wimberly could have brought a Title VII action against J.C. Penney Co., Inc., and intentionally elected not to do so.

The proposal of the A.C.L.U. would cause state employment compensation administrative officers to make Title VII determinations which they are ill-equipped to make. Moreover, there is nothing in the language or legislative history of section 3304 (a)(12) that would authorize such a distortion of the statute.

12. The Solicitor General apparently does not agree with the Commission since he acknowledges Congress' interest in promoting childbirth and agrees that Congress could enact constitutionally permissible legislation that favors pregnant women. (S.G. Br. 13 n.13).

fication of two groups—"pregnant women and non-pregnant persons." *Id.* The state of California was found to have had a legitimate interest in maintaining the self-supporting nature of its insurance program and was therefore justified in excluding pregnancy from disability coverage. *Id.* at 496.

Similarly, Congress has a legitimate interest in protecting potential life and encouraging childbirth. *Harris v. McRae*, 448 U.S. 297, 325 (1980). In *Harris*, this Court held that federal Medicaid statutory restrictions in funds for abortions did not violate the equal protection component of the Fifth Amendment because Congress established incentives to make childbirth a more attractive alternative than abortion and these incentives bore "a direct relationship to the legitimate congressional interest in protecting potential life." *Id.*

In section 3304(a)(12) Congress has "neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class." *Id.* at 326. Congress has satisfied the "only requirement of equal protection" that section 3304 (a)(12) be "rationally related to a legitimate government interest." *Id.* Congress is providing a benefit (not welfare) for eligible women to ease the hardship suffered by those who choose to continue their pregnancies and have their babies. Congress recognized that these women should not be denied benefits when they are not reinstated in their jobs after childbirth. The provision of benefits to these women while not explicitly providing benefits to other persons who leave their jobs due to illness bears a direct relationship to the legitimate congressional interest in promoting childbirth and protecting potential human life.

Even if the pregnancy classification could be construed as gender-based instead of a distinction between pregnant

and non-pregnant people, the Court must review the type of distinction made and in weighing that distinction with its congressional purpose conclude that no equal protection violation exists. *See Rostker v. Goldberg*, 453 U.S. 57 (1981). In *Rostker*, the plaintiff challenged a presidential order mandating the registration of certain groups of men for the draft as violative of the equal protection component of the Fifth Amendment. This Court held that Congress had not acted "unthinkingly or reflexively" in exempting women from registration and that the exemption was not an "accidental byproduct of a traditional way of thinking" about women. *Id.* at 72-74. Rather the exemption was closely related to the congressional purpose behind instituting draft registration which is to "prepare for a draft *of combat troops.*" *Id.* at 76. It was determined that the distinction "realistically reflects the fact that the sexes are not similarly situated." *Id.* at 79.

In the instant case, Congress thoroughly analyzed the problems of employees who must leave their jobs due to pregnancy. (Pet. Br. 19-26). Congress recognized that men are not similarly situated to women in matters of pregnancy just as this Court found that they are not similarly situated in matters of draft registration. Because they are unable to bear children, men would never encounter the severe problems faced by many new mothers who are not reinstated in the jobs they were forced to leave in order to deliver their babies and who need employment in order to support their children. Congress acknowledged this dilemma and thoughtfully and carefully enacted section 3304(a)(12). No invidious discrimination exists, thus no equal protection violation can be found.[13]

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13. The potential equal protection violation is even less plausible here than in the *Rostker* case. It is possible that women could serve in a combat capacity. Other countries have recog-

(Continued on following page)

The different roles men and women play in reproduction have been recognized by this Court as creating the need to legislate on behalf of one sex as long as the government has a strong interest and the statute at issue is sufficiently related to its purpose. *See Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981). In *Michael M.*, this Court stated that it has "consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Id.* The Court went on to stress that "a legislature may 'provide for the special problems of women'." *Id.* citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

The issue in *Michael M.* was whether a state may attack the problem of sexual intercourse and teenage pregnancy by prohibiting a male from having sexual intercourse with a minor female. This Court found that young men and young women "are not similarly situated with

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Footnote continued—

nized this and have used women in such a role. However, men obviously can never play the same child bearing role as women.

This Court has stated that a state may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest. *Lehr v. Robertson*, 463 U.S. 248, 265-266 (1983). There can be no doubt that the state's interest is substantial in promoting childbirth and securing insurance benefits for women who are able to work and available for work but who are denied reinstatement in their jobs after pregnancy. This crucial state interest, when weighed against the disparity created (which in actuality does not exist since men can never find themselves in the exact same situation), satisfies even the strictest scrutiny for determining an equal protection violation.

Wygant v. Jackson Board of Education, 54 U.S.L.W. 4479 (U.S. May 19, 1986) is cited by the Commission for the proposition that preferential layoff protection is impermissible under the Constitution, and therefore preferential unemployment compensation protection would also be impermissible. However, *Wygant* involved the suspect classification of race and the failure of the government to justify the classification by a compelling interest. Additionally, the two groups of people (minorities and non-minorities) were similarly situated.

respect to the problems and the risks of sexual intercourse." *Id.* at 471. Because only women become pregnant, "they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Id.* As a result, the California statute was upheld as a reasonable reflection of the fact that the "consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male." *Id.* at 476.

Similarly, in the instant case the consequences of pregnancy fall more heavily on the working woman than the working man. A man who has engaged in reproductive conduct is not forced to take a leave from his job in order to deliver his baby and regain his physical strength.[14] He need not be separated from his job for any physical reason. A woman, on the other hand, has no choice. She must be separated from her job in order to give birth. She therefore runs the risk of losing her job if her employer will not reinstate her after she is physically able to return to work. Congress recognized this increased burden and hardship suffered by working women and enacted section 3304(a)(12).

CONCLUSION

For the foregoing reasons, the decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

JULIE E. LEVIN (Counsel of Record)
Legal Aid of Western Missouri
Counsel for Petitioner

November 21, 1986

14. For a general discussion of the different economic consequences experienced by men and women who engage in reproductive conduct see Brief of Equal Rights Advocates et al. as Amicus Curiae for Petitioner 4-11.

APPENDIX

APPENDIX A

MODES 3422-R1
APP. 9-80
DES-BAP001B-00

State of Missouri
DIVISION OF EMPLOYMENT SECURITY
Jefferson City

DECISION OF APPEALS TRIBUNAL

Appeal No. 85-11116 TYPE R-A

IN THE MATTER OF THE CLAIM OF:

KAREN REYNOLDS (Claimant) — CRITON CORPORATION ET AL DBA MIDCON CABLES (Employer) — A

SS No. 497-86-3532

Deter. Date:	Appeal Filed:	Filed By:
05-23-85	06-07-85	EMPLOYER

A deputy determined under the Missouri Employment Security Law that the claimant was not disqualified for benefits, on a finding that she was discharged on May 3, 1985, but not for misconduct connected with her work. The employer filed a timely appeal from that determination.

After due notice to the interested parties the Appeals Tribunal heard the appeal on June 27, 1985, in Joplin, Mis-

souri. There was no appearance on behalf of the claimant. The employer's industrial relations manager was present and testified.

FINDINGS:

The claimant began work for the employer on January 3, 1984. As of May 2, 1984, the claimant was performing part-time work 20 hours per week.

On May 3, 1985, the claimant presented a doctor's report to the employer's industrial relations manager which stated "Karen Reynolds should not be working around chemical fumes as she is pregnant". The claimant further told the industrial relations manager that she would not continue her current working assignment which did involve working around chemical fumes. As a part-time employee, the claimant had no right to a leave of absence under the collective bargaining agreement.

The Missouri Employment Security Law provides that a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages for insured work equal to ten times his weekly benefit amount if it is found that he left his work voluntarily without good cause attributable to his work or to his employer. The Law further provides that a claimant shall be disqualified for waiting week credit or benefits for not less than four nor more than sixteen weeks for which he claims benefits and is otherwise eligible if it is found that he has been discharged for misconduct connected with his work. The Law further provides that a disqualification for misconduct shall not apply to any week which occurs after the claimant has earned wages for work insured under the unemployment compensation laws of any state in an amount equal to ten times his weekly benefit amount.

It is found that the claimant left her work voluntarily on May 3, 1985, because of her inability to continue to perform her assigned work while pregnant. This cause for leaving is not attributable to the claimant's work or employer. Therefore, it is found that the claimant left her work voluntarily on May 3, 1985, without good cause attributable to her work or to her employer.

DECISION:

The deputy's determination is reversed. The claimant is disqualified for benefits until she has earned wages for insured work after May 3, 1985, equal to ten times her weekly benefit amount.

Dated and mailed at Jefferson City, Missouri, this 3rd day of July, 1985.

RANDALL TERRY
APPEALS REFEREE

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APPENDIX B

MODES 3422-R1
APP. 9-80
DES-BAP001B-00

State of Missouri
DIVISION OF EMPLOYMENT
SECURITY
Jefferson City

DECISION OF APPEALS TRIBUNAL

Appeal No. 85-13085 TYPE R-A

IN THE MATTER OF THE CLAIM OF:

GINA M GRAVES CONSUMERS MARKETS INC

(Claimant) (Employer) A

SS No. 493-70-8985

Deter. Date:	Appeal Filed:	Filed By:
07-03-85	07-10-85	EMPLOYER

A deputy determined under the Missouri Employment Security Law that the claimant was not disqualified for benefits, on a finding that she was discharged on May 29, 1985, but not for misconduct connected with her work. The employer filed a timely appeal from that determination.

After due notice to the interested parties the Appeals Tribunal heard the appeal on July 30, 1985, in Springfield, Missouri. The claimant was present and testified. The employer's store manager was present and testified.

FINDINGS:

The claimant worked for the employer as a courtesy clerk from May 15, 1985 through May 29, 1985. The claimant

did not work for the employer long enough to move from a status as a probationary employee to an employee entitled to the benefits under the collective bargaining agreement which the employees have with the employer. As a probationary employee, the claimant was not entitled to a medical or maternity leave of absence which is provided for under the collective bargaining agreement. The claimant began missing some work due to illness resulting from her pregnancy and ultimately she provided the employer with a report from her physician which advised her to refrain from lifting anything over 20 pounds and to rest with her feet elevated if she experiences lower abdominal cramping. The restrictions the claimant had to impose upon her ability to work limited her ability to sack and carry out the customers' groceries. On May 29, 1985, the store manager advised the claimant that he could not use her services under these circumstances and the claimant did not work for the employer after that.

The Missouri Employment Security Law provides that a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages for insured work equal to ten times his weekly benefit amount if it is found that he left his work voluntarily without good cause attributable to his work or to his employer.

It is found that the claimant was unable to continue performing her services at work which the employer had available for her after May 29, 1985, and that her inability to continue in that work was the cause of her unemployment.

Therefore, it is found that the claimant has left her work voluntarily. It is also found that the claimant's unemployment was not caused by or attributable to her work or to her employer. Accordingly, it is found that the

claimant left her work voluntarily on May 29, 1985, without good cause attributable to her work or to employer.

DECISION:

The deputy's determination is reversed. The claimant is disqualified from receiving benefits until she has earned wages in insured work after May 29, 1985, equal to ten times her weekly benefit amount by reason of her voluntary separation from work on that date.

Dated and mailed at Jefferson City, Missouri, this 7th day of August, 1985.

ROBERT L. SMITH
APPEALS REFEREE

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APPENDIX C

MODES 3422-R1
APP. 9-80
DES-BAP001B-00

State of Missouri
DIVISION OF EMPLOYMENT SECURITY
Jefferson City

DECISION OF APPEALS TRIBUNAL

Appeal No. 84-13311 TYPE R-A

IN THE MATTER OF THE CLAIM OF:

SHERYL FARLEY	CHURCH'S FRIED CHICKEN INC	
(Claimant)	(Employer)	A
SS No. 498-76-9780		

Deter. Date:	Appeal Filed:	Filed By:
06-28-84	07-05-84	CLAIMANT

A deputy determined under the Missouri Employment Security Law that the claimant was disqualified for benefits until she has earned wages after June 4, 1984, equal to ten times her weekly benefit amount, on a finding that she left her work voluntarily on that date without good cause attributable to her work or to her employer. The claimant filed a timely appeal from that determination.

After due notice to the interested parties the Appeals Tribunal heard the appeal on July 26, 1984, in Kansas City, Missouri. The claimant was present and testified. There were no appearances on behalf of the employer.

FINDINGS:

The claimant worked for the employer as a cashier from August 10, 1982 until June 4, 1984. On April 2, 1984 the claimant, who was pregnant, was advised by her physician that because she was experiencing swelling of her feet caused by her pregnancy and standing on her feet for long periods in the performance of her job, she should take several breaks during the day to sit down. The claimant's employer complied with the advise (sic) of her physician and allowed her to rest as much as possible. On or about May 25, 1984, the claimant requested that her hours of work be reduced to fours (sic) per day because she was still experiencing the swelling of her feet. The employer granted the claimant's request. On June 2 and June 3, 1984, the claimant was not scheduled to work. On June 4, 1984 the claimant's feet were swollen and she was not able to work. She telephoned her supervisor to report that she would not work the scheduled hours that day, and that she would not be able to continue working because of the swelling of her feet due to her pregnancy. When she telephoned her supervisor on June 4, 1984, she requested that she be placed on a medical leave of absence. Her request was not granted. The claimant did not return to work after June 4, 1984.

The Missouri Employment Security Law, Chapter 288, RSMo 1978, as amended, provides in part as follows:

> 288.050.1. Notwithstanding the other provisions of this law a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages equal to ten times his weekly benefit amount if the deputy finds
>
> (1) That he has left his work voluntarily without good cause attributable to his work or to his employer;
>
> . . .

The Missouri Court of Appeals in the case of Bussman Manufacturing company v. Industrial Commission (sic), 335 S.W.2d 456 (Mo.App. 1960), stated that there was no causal connection between the claimant's disability (pregnancy) and the work. To avoid a disqualification it must be shown that the claimant left her work with good cause attributable to the work or the employer. It is found that on June 4, 1984, the claimant informed her employer that she could not continue working because her feet were swelling, which was caused by her pregnancy and standing on her feet while performing her work. Even though the claimant was advised by her physician to leave her work due to this problem caused by her pregnancy, it is found that her physician did not issue this advise (sic) until June 8, 1984, which was after the claimant had already left her work. Even if the claimant requested that her employer place her on a leave of absence on June 4, 1984, as she alleges, the employer was under no obligation to grant the claimant's request. Leaving work due to pregnancy is not for good cause attributable to the work or to the employer. Therefore it is found that the claimant left her work voluntarily on June 4, 1984, without good cause attributable to the work or to the employer.

DECISION:

The deputy's determination is affirmed. The claimant is disqualified for benefits until she earns wages after June 4, 1984 equal to ten times her weekly benefit amount, by reason of her separation from work on that date.

Dated and mailed at Jefferson City, Missouri, this 2nd day of August, 1984.

D. C. WEST
APPEALS REFEREE

cc

AMICUS CURIAE

BRIEF

No. 85-129

In the Supreme Court of the United States

OCTOBER TERM, 1986

LINDA WIMBERLY, PETITIONER

v.

LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether 26 U.S.C. 3304(a)(12), which prohibits states from denying unemployment benefits "solely on the basis of pregnancy," requires a state to provide unemployment benefits to women who are denied reinstatement to employment after leaving work on account of pregnancy, even if the state denies unemployment benefits to all persons who are denied reinstatement after leaving work for reasons not causally connected to the work or the employer.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-129

LINDA WIMBERLY, PETITIONER

v.

LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States Department of Labor is responsible for administering the Federal Unemployment Tax Act, which includes the review of state unemployment laws for compliance with the conditions of 26 U.S.C. (& Supp. II) 3304. This case involves the construction of Section 3304(a)(12), which was added to the Act in 1976. Since its adoption, the Department has construed this provision in a manner consistent with the Missouri Supreme Court's decision in this case.

STATEMENT

1. In 1935 Congress established a nationwide unemployment insurance system. The system is a cooperative federal-state program designed to provide partial wage replacement for eligible workers during periods of involuntary unemployment. Federal statutes define minimum standards—which are set out at

26 U.S.C. (& Supp. II) 3304(a) and 42 U.S.C. (& Supp. II) 503—to which a state must adhere in order to qualify for grants for the administration of its unemployment compensation law and so that employers in the state may qualify for tax credits.[1] The Secretary of Labor has the statutory responsibility for determining whether states adhere to the federal standards (26 U.S.C. 3304(c)). The Secretary is directed not to certify a state if, after reasonable notice and opportunity for a hearing, he finds that state law does not conform with an enumerated list of federal standards or that the state is not substantially complying with those requirements (*ibid.*).[2] At issue in this case is one federal standard, 26 U.S.C. 3304 (a)(12), which prohibits states from denying unemployment benefits "solely on the basis of pregnancy or termination of pregnancy."

Aside from the federal standards, the rules governing the state programs are left to the discretion of the states. Each state has a comprehensive unemployment compensation statute and while state programs vary as to specific provisions, all apply some version of a three-part test to determine entitlement to benefits. First, all states require claimants to have earned a specified amount of wages or to have worked a specified number of weeks in covered employment

[1] Under the Federal Unemployment Tax Act, a payroll tax is levied on employers. Proceeds of the tax are used primarily to fund the administrative costs of state unemployment benefit programs that meet the federal minimum standards. 42 U.S.C. (& Supp. II) 502, 1101. Employers within a state that has a program satisfying the federal minimum standards receive a partial credit against their Federal Unemployment Tax Act liability for their contributions to the state unemployment compensation fund. 26 U.S.C. (& Supp. II) 3302, 3304.

[2] All fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands have structured their unemployment laws to participate in the federal-state program.

during a one-year base period in order to be entitled to receive benefits. Second, all states also require claimants to be "eligible" for benefits; that is, to be able to work and available for work. Third, claimants who satisfy these requirements may nevertheless be "disqualified" for some other reason set forth in state law. The three major disqualifications, which are common to almost all state unemployment compensation laws (though not set out in any federal standard) are voluntarily leaving a job without good cause, being discharged for misconduct, and refusing to accept an offer of suitable employment.

Section 288.050.1(1) of Missouri's unemployment compensation statute disqualifies a claimant who "has left his work voluntarily without good cause attributable to his work or to his employer" (Mo. Ann. Stat. (Vernon 1965 & Supp. 1986)). The Missouri courts have consistently construed this language to disqualify any claimant who has left his or her former job for a reason that is not causally connected to the work or the employer.[3] Thus, even when a claimant leaves work because he is ill, the claimant is disqualified under the Missouri statute when he is next able and seeks work, unless the illness was caused by or aggravated by the work or the employer. *Fifer* v. *Missouri Division of Employment Security*, 665 S.W.2d 81 (Mo. Ct. App. 1984); *Duffy* v. *Labor & Industrial Relations Comm'n*,

[3] One court explained this interpretation of the statute by referring to the consistent position of the Missouri court's "that § 288.050[.]1(1) may not be read as if there were a disjunction after the word 'voluntarily' so that the section imposed dual elements for a finding of disqualification, i.e., that the termination was both voluntary and without good cause attributable to her work or to her employer" (*Duffy* v. *Labor & Industrial Relations Comm'n*, 556 S.W.2d 195, 198 (Mo. Ct. App. 1977)). However one explains it, this issue of Missouri law has been clearly and emphatically determined by the Missouri courts.

556 S.W.2d 195 (Mo. Ct. App. 1977).[4] Accordingly, the Labor and Industrial Relations Commission of Missouri and the state courts have construed the statute to require disqualification of a claimant who leaves her most recent employment because of pregnancy. *Bussman Mfg. Co.* v. *Industrial Comm'n*, 335 S.W.2d 456 (Mo. Ct. App. 1960).

2. After having been employed by the J.C. Penney Company for approximately three years, petitioner sought a leave of absence on account of her pregnancy in August 1980. Pursuant to its established policy, J.C. Penney granted petitioner a "leave" without a guarantee of reinstatement—that is, it said that petitioner would be rehired only if a position were available when she was ready to return to work. Pet. App. A2. Petitioner's child was born on November 5, 1980. On December 1, 1980, petitioner informed J.C. Penney that she wished to return to work, but was told that there were no positions open. *Ibid.*

Petitioner then filed a claim for unemployment benefits. The Division of Employment Security determined that petitioner was disqualified under Section 288.050.1(1) (Pet. App. A51-A53). Petitioner appealed the decision to the Division's appeals tribunal which, after a full evidentiary hearing, affirmed the decision denying petitioner benefits (*id.* at A48-A50). The Industrial Relations Commission denied petitioner's petition for review (*id.* at A46-A47).

Petitioner then sought review in the circuit court, and that court held that petitioner was entitled to

[4] Missouri courts have also determined that claimants left work "voluntarily without good cause attributable to his work or to his employer" when the claimant left work on account of the illness of the claimant's spouse (*Division of Employment Security* v. *Labor & Industrial Relations Comm'n*, 617 S.W.2d 620, 623 (Mo. Ct. App. 1981)), and when the claimant left work because the claimant was unable to find a babysitter (*Lyell* v. *Labor & Industrial Relations Comm'n*, 553 S.W.2d 899 (Mo. Ct. App. 1977)).

receive unemployment benefits (Pet. App. A40-A45). The court concluded that Missouri law was inconsistent with Section 3304(a)(12), as construed in *Brown* v. *Porcher*, 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), and therefore could not be enforced (Pet. App. A44). The Missouri Court of Appeals affirmed the circuit court's decision (*id.* at A23-A40). Although the appellate court expressed "reservations concerning the soundness of the ruling in *Brown*" (*id.* at A39), it nevertheless felt compelled to follow the Fourth Circuit's construction of Section 3304(a)(12).

The Missouri Supreme Court reversed (Pet. App. A1-A23). Rejecting the notion that it was bound by the Fourth Circuit's decision in *Porcher* (Pet. App. A7-A8), the court concluded that the plain language of the statute, which proscribes discrimination "solely on the basis of pregnancy," indicates that only laws that single out pregnancy for special treatment and deny unemployment benefits on account of pregnancy alone are prohibited. Moreover, the court determined that this was an appropriate instance in which to defer to the Department of Labor's interpretation of the statute, which is that claimants who leave work because of pregnancy may be treated like all other claimants who leave work for reasons not attributable to their employment in determining whether claimants are entitled to unemployment compensation (*id.* at A10).[5]

[5] Three judges dissented. They concluded that Section 3304(a)(12) "on its face" bars disqualification of women who leave their jobs because of pregnancy (Pet. App. A18), and rejected the Department of Labor's contrary interpretation as unpersuasive (*id.* at A17-A18). The dissenting judges also would have read Section 288.050.1(1) disjunctively, contrary to the prior appellate decisions construing the statute, so that a claimant would be entitled to receive unemployment benefits as long as the claimant did not leave work "voluntarily" (Pet. App. A19).

SUMMARY OF ARGUMENT

As the Missouri Supreme Court held, the language of 26 U.S.C. 3304(a)(12) providing that states may not deny unemployment benefits "solely on the basis of pregnancy" prohibits states from singling out pregnancy for disadvantageous treatment under state unemployment compensation laws. By focusing on whether pregnancy is the sole basis for a denial of benefits, Congress distinguished special disqualifications pertaining only to pregnancy—which it prohibited—from neutral rules which incidentally disqualify pregnant or formerly pregnant women as part of a larger group—which it did not prohibit. Indeed, petitioner concedes that Congress did not mean to prohibit states from applying other neutral rules, such as the rule that a claimant must be able to work and available for work, in determining whether women who leave work because of pregnancy are entitled to compensation.

The language of the statute cannot reasonably be read, as petitioner would read it, to require that any woman who leaves work because she is pregnant is necessarily entitled to receive unemployment benefits when she is next available and able, but unsuccessfully seeks work. Nor is there merit to petitioner's argument that Congress must have meant to mandate preferential treatment for pregnant claimants. Not only does the plain language of Section 3304(a)(12) appear inconsistent with such an interpretation, but on two occasions this Court has construed similar language in other statutes as embodying only an anti-discrimination principle against adverse treatment based on the protected trait.

The legislative history shows that Congress enacted Section 3304(a)(12) to eliminate two kinds of statutes that were common during the 1970s. One type of statute automatically disqualified women from receiving compensation for a period before and after childbirth. The second type of statute established an explicit disqualification from eligibility applicable only to women leaving work on account of pregnancy. The Missouri statute at issue here is not that type of statute because it is not specifically addressed to pregnancy but instead disqualifies all claimants who leave work for a reason not causally related to their work or their employer.

The legislative history confirms that Congress prohibited only special disqualifications pertaining to pregnancy, and contains no suggestion of an intent to mandate preferential treatment for pregnant women. To the contrary, a Labor Department researcher testified at the hearings preceding the adoption of Section 3304(a)(12) that legislation was needed to require states to treat pregnancy the same as "any other kind of physical disability." The co-sponsor of the bill that contained Section 3304(a)(12) stated that women who left work on account of pregnancy "ought to be treated no differently than any other unemployed individual available for work." Other statements in the legislative history emphasize that although states would not be permitted to single out women for disadvantageous treatment on account of pregnancy, they would be able to enforce neutral rules relating to eligibility for benefits.

The unemployment compensation system is a cooperative federal-state program in which the states have broad autonomy limited by a body of federal standards, including Section 3304(a)(12). Petitioner's interpretation of Section 3304(a)(12) significantly restricts the discretion of the states and creates great uncertainty as to what rules are permissible. It would impose additional costs on the state, and, without drawing a clear line, forbid some but not other neutral disqualification rules on the ground

that pregnant or formerly pregnant women are among those being excluded. Such an interpretation should not be adopted absent clear congressional intent to do so, which cannot be found in either the language or the legislative history of the statute.

Finally, the Department of Labor, which was involved in the adoption of Section 3304(a)(12), has consistently interpreted it to prohibit only state rules that single out pregnancy for disadvantageous treatment, and has never interpreted it to prohibit states like Missouri from treating pregnant women the same as other claimants. This longstanding interpretation by the agency responsible for administration of the statute is entitled to substantial deference. Since the Department's construction is a reasonable one that is supported by the statutory language, the relevant statements of legislative intent, and the scheme of the unemployment compensation system, its interpretation ought to be adopted by this Court.

ARGUMENT

SECTION 3304(a)(12) PERMITS MISSOURI TO DISQUALIFY FROM RECEIVING UNEMPLOYMENT COMPENSATION ALL PERSONS WHO LEAVE WORK WITHOUT GOOD CAUSE ATTRIBUTABLE TO THEIR EMPLOYMENT, EVEN THOUGH WOMEN WHO LEAVE WORK BECAUSE OF PREGNANCY ARE THEREBY DISQUALIFIED

The states deal with women who leave their jobs on account of pregnancy in a variety of ways. Most states regard such action as a voluntary termination for good cause, following which the woman is eligible for unemployment benefits at such time as she reenters the job market and is able to meet the other relevant criteria. Some states have specifically included pregnancy-motivated termination within a statutory provision enumerating good causes for leaving a job.[6] Other states, by administrative or judicial decision, have determined that such terminations are involuntary or fall within broader categories constituting good cause for leaving a job, such as illness or compelling personal reasons.[7] A few states, like Missouri, have defined good cause narrowly, so that all persons who leave their jobs are disqualified from receiving benefits unless they leave for reasons directly attributable to the work or to the employer.[8]

By treating women who leave their jobs because of pregnancy the same as other persons who leave for reasons not causally connected to the work or the employer, including those suffering from other types of temporary disabilities, Missouri has complied with the terms of 26 U.S.C. 3304(a)(12). Congress, in providing that "no person shall be denied compensation under such State law solely on the basis of pregnancy," meant to prohibit states from singling out pregnancy for disadvantageous treatment by specific legislation or discriminatory practices aimed at pregnant women. Contrary to petitioner's assertions, however, Section 3304(a)(12) was not intended to require that pregnant women be immunized from the adverse effects of neutral state rules.

A. The language of Section 3304(a)(12) is most reasonably construed as prohibiting states from singling out pregnancy for disadvantageous treatment

Section 3304(a)(12) provides that states may not deny unemployment benefits "solely on the basis of

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[6] See, *e.g.*, Ark. Stat. Ann. § 81-1106(a) (1976 & Supp. 1985); S.D. Codified Laws Ann. § 61-6-3 (1978); Tenn. Code Ann. § 50-7-303(a)(1) (Supp. 1985).

[7] See, *e.g.*, *Craighead* v. *Administrator, Department of Employment Security*, 420 So. 2d 688 (La. Ct. App. 1982); Cal. Admin. Code tit. 22, R. 1256-15(b), *reprinted in* 2 Unempl. Ins. Rep. (CCH) ¶ 52190 (Apr. 8, 1982).

[8] See, *e.g.*, Okla. Stat. Ann. tit. 40, §§ 2-404, 2-405 (West 1986); Vt. Stat. Ann. tit. 21, § 1344(a)(3) (1978 & Supp. 1985).

pregnancy." That language is most naturally read as prohibiting states from enacting laws or implementing practices that single out pregnancy for disadvantageous treatment, since the statute provides that pregnancy may not constitute the *sole basis* for a decision to deny benefits. By focusing on the *basis* for the state's decision, Section 3304(a)(12) requires an examination of the rules that states use in deciding which categories of unemployed persons should receive benefits and which should not. By providing that pregnancy may not constitute the *sole* reason for the denial, Congress intended to prohibit rules that treat women who are pregnant differently from persons who are in other respects similarly situated.

A state law that provides that pregnant women or new mothers are not entitled to receive unemployment compensation for a specified period, regardless of whether they would otherwise be entitled to such benefits, is clearly prohibited by the statute. Likewise, a state law that provides that women who leave work because they are pregnant are not entitled to compensation is prohibited if other persons who leave work for similar reasons are entitled to benefits.[9] In such cases the sole basis for decisions denying compensation to women affected by such rules is that the claimant was pregnant. But a state law, like Missouri's, that denies benefits to persons who leave their jobs for any reason not causally connected to the work or the employer does not single out women for disadvantageous treatment because they are or were pregnant. Here, petitioner was not denied benefits solely on the basis of pregnancy, but, rather through the application of a rule unrelated to pregnancy,

[9] These two types of statutes were common during the 1970s, and the legislative history shows that Congress was aware of these two types of statutes and intended Section 3304(a)(12) to prohibit states from enforcing them. See pages 16-18, *infra*.

which works to exclude large numbers of men and non-pregnant women as well.

Petitioner's primary argument to the contrary is that Section 3304(a)(12) by its plain language requires payment of benefits to any otherwise eligible woman who "stopped working solely because of her pregnancy" (Br. 12).[10] The essential flaw in this argument is that Section 3304(a)(12) looks to the state's basis for denying benefits rather than to the claimant's motivation in leaving employment. Had Congress meant to guarantee benefits to all women who leave their jobs solely on account of pregnancy, it could have said so.[11] But it did not. While, as petitioner notes, "she had previously stopped work because of her pregnancy" (Br. 12), it was the fact that she stopped work for a reason bearing no causal connection to her work or her employer that caused the state to find her ineligible for benefits.

Indeed, petitioner admits that Section 3304(a)(12) does not mean that women who leave work solely because they are pregnant are entitled to compensation, whether or not they comply with other pregnancy-

[10] In *Brown* v. *Porcher*, 660 F.2d at 1004, the court of appeals similarly concluded without extensive analysis of the language of Section 3304(a)(12) that it unambiguously requires payment of unemployment compensation to women who stopped working because they were pregnant. Had the court considered carefully the words of the statute, we think it would have concluded, as three Justices of this Court noted in dissenting from the Court's denial of certiorari in *Porcher*, that "[i]t is by no means clear, however, that § 3304(a)(12) does not simply provide that pregnancy must be treated like all other disabilities—that pregnancy simply cannot be singled out for unfavorable treatment" (459 U.S. at 1151 (White, J., with whom Powell, J., and Rehnquist, J., joined)).

[11] Had Congress intended Section 3304(a)(12) to be construed in the manner urged by petitioner, it could have provided, for example, that "no woman who leaves work because of pregnancy or termination of pregnancy shall be denied compensation when she is able to work and available for work."

neutral requirements of the state unemployment law. She agrees (Br. 13, 24) that that Section does not affect the states' ability to impose on pregnant women other types of eligibility requirements, such as the requirement that all claimants be able to work and available for work, in order to receive benefits.[12] She nevertheless maintains that the Missouri requirement at issue here is somehow different and invalid.

Section 3304(a)(12) does not allow for such a distinction. A woman who is unable to work due to the physical limitations of her pregnancy is, just like petitioner, unable to work "solely because of her pregnancy" (see Pet. Br. 12-14). Petitioner offers no explanation as to why the statutory language, by its "plain meaning," requires that the Missouri statute be invalidated but leaves a state free to deny benefits to women who are either unable or unavailable for work because they are pregnant. No such explanation is possible because Section 3304(a)(12) simply prohibits states from singling out pregnancy for disadvantageous treatment.[13]

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[12] Petitioner acknowledges (Br. 24-25) Congress's intent that pregnant women meet relevant state eligibility criteria such as "ability to work, availability for work, and efforts to find work." That concession is mandated by the fact that it is almost inconceivable that Congress meant to require states to provide benefits, for example, to women who left work because they were pregnant but do not want to return to work, since no state awards compensation to persons who do not want to work. Moreover, the legislative history makes clear beyond any doubt that Congress did not intend to except women from common eligibility rules such as the rule that claimants must be available for work. See, *e.g.*, S. Rep. 94-1265, 94th Cong., 2d Sess. 21 (1976); H.R. Rep. 94-755, 94th Cong., 1st Sess. 50 (1975); 122 Cong. Rec. 22518 (1976) (remarks of Rep. Steiger).

[13] We note that nothing in the language of Section 3304(a)(12) prohibits states from singling out pregnant women for advantageous treatment. That is in contrast to the language of the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) (prohibition of discrimination because of sex includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions") at issue in *California Federal Savings & Loan Ass'n* v. *Guerra*, No. 85-494, which in our view prohibits employers from favoring pregnant women over other workers suffering short-term disabilities in employment decisions governed by Title VII of the Civil Rights Act of 1964. In addition, as we stated in our amicus brief (at 8) in No. 85-494, we do not doubt that Congress or state legislatures could enact rules favoring pregnant women that would pass constitutional muster, since there is a rational basis for promoting childbirth. *Harris* v. *McRae*, 448 U.S. 297, 325 (1980).

This Court's decision in *California Federal Savings & Loan Ass'n*, dealing with Title VII, does not control its decision in this unemployment compensation case. See *Vick* v. *Texas Employment Comm'n*, 514 F.2d 734, 736 (5th Cir. 1975). Nor does this case control that one. Still, the issues posed in the two cases are not unrelated. Our positions—that Congress mandated equal treatment in the Pregnancy Discrimination Act and did not mandate preferential treatment in enacting Section 3304(a)(12)—give the two statutes a consistent reading. Even if the position we support in *California Federal Savings & Loan Ass'n* should not prevail, however, and the Court holds that the Pregnancy Discrimination Act does not prohibit preferential treatment of women on account of pregnancy, there would be no inconsistency in holding in this case that Section 3304(a)(12) does not mandate preferential treatment of women on account of pregnancy. If our position prevails in *California Federal Savings & Loan Ass'n*, on the other hand, it would attribute some degree of inconsistency to Congress to hold that, while forbidding preferential treatment in the Pregnancy Discrimination Act, it mandated preferential treatment in Section 3304(a)(12).

In other instances involving similarly worded statutes this Court has found a prohibition of discrimination rather than a mandate of special treatment. In *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), for example, this Court considered Section 504 of the Rehabilitation Act, 29 U.S.C. 794, which states, in part, that "[n]o otherwise qualified handicapped" person "shall, solely by reason of his handicap, be excluded" from participation in certain specified activities. It held that that statute did not require that handicapped individuals be given pref-

erential treatment in the sense of ignoring the ways in which their handicap may adversely affect their qualifications, but rather meant "only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context" (442 U.S. at 405 (footnote omitted)).

Similarly, in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549 (1981), the Court considered Section 2021(b)(3) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021(b)(3), which provides that persons "shall not be denied retention in employment * * * because of any obligation as a member of a Reserve component of the Armed Forces." The Court held that that provision was intended to "protect[] the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status" (452 U.S. at 559), and did not require that an employer make work schedule accommodations for reserve obligations.

In both of these statutes, Congress used language quite similar to that of Section 3304(a)(12) to protect certain classes of people against adverse treatment. In each instance, contrary to the rule of construction espoused by petitioner, this Court has held that the statute affords no preferential treatment against neutral rules or actions, but rather is a protection against discrimination based on the protected trait. In Section 3304(a)(12), Congress provided that women could not be denied unemployment compensation benefits "solely on the basis of pregnancy." There is no reason to conclude, as petitioner suggests, that Congress meant to protect pregnant or formerly pregnant women from a neutral rule disqualifying anyone who leaves a job for a reason unrelated to the work or the employer. Rather, the language of Section 3304(a)(12) indicates that Congress meant

that women could not be singled out for disadvantageous treatment on account of pregnancy.[14]

B. The legislative history of Section 3304(a)(12) evidences congressional intent to prohibit only special disqualifications imposed on women on account of pregnancy

The legislative history of Section 3304(a)(12), while sparse, makes clear that Congress was concerned only with special rules directed at women who are or have been pregnant. In 1975, during hearings on "Existing Unemployment Compensation Programs," a Labor Department researcher testified concerning the undesirability of state statutory provisions "which treat[] inability to work because of pregnancy or the existence of pregnancy * * * as different from any other kind of physical disability." *Phase I: Existing Unemployment Compensation Programs: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 86-87 (1975) (statement of Margaret Dahm, Unemployment Insurance Service, Office of Research, Legislation and Program Policy). There was no testimony indicating any disagreement with state provisions that neutrally disqualified workers who leave their jobs for reasons unrelated to their

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[14] Petitioner's related argument (Br. 14-18) that Section 3304(a)(12) requires that she is entitled to compensation because it is not phrased like other "antidiscrimination provision[s]" (Br. 14), is equally unavailing. In petitioner's view, the omission from Section 3304(a)(12) of the word "discriminate" or other language unequivocally requiring equal treatment shows that the section was intended to mandate preferential treatment for pregnant women. Petitioner has offered no support for her novel assertion that some form of the root word "discriminate" is essential to a statute that prohibits one class of individuals from being singled out for disadvantageous treatment.

employment.[15] Nor was there any testimony suggesting that women who had been pregnant should be given any sort of preferential treatment under unemployment compensation rules.

A bill containing the language now found in Section 3304(a)(12) was reported from committee to the full House at the end of 1975. The House Report explained the focus of the new federal requirement by stating: "Nineteen States have *special disqualification provisions pertaining to pregnancy.* Several of these provisions hold pregnant women unable to work and unavailable for work; the remainder disqualify a claimant because she left work on account of her condition or because her unemployment is a result of pregnancy." H.R. Rep. 94-755, 94th Cong., 1st Sess. 7 (1975) (emphasis added).[16] Thus it appears that Congress sought to prohibit one type of statute that disqualifies women for a defined period before and

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[15] While it appears that a minority of states apply rules like Missouri's that disqualify all claimants who leave work for a reason unrelated to their employment, the application of Missouri's rule to disqualify women who leave work because they are pregnant was well-established at least 15 years before Section 3304(a)(12) was enacted. See *Bussman Mfg. Co.* v. *Industrial Comm'n, supra.* Anyone opposed to that interpretation could have raised the issue at the hearings on the unemployment compensation provisions, just as others complained about rules that single out pregnancy for disadvantageous treatment.

[16] The report did not specify which 19 states had special disqualification provisions pertaining to pregnancy, but petitioner agrees (Br. 23) that Congress probably was referring to the 19 states listed in a program letter issued by the Department of Labor (Unemployment Insurance Program Letter No. 33-75 (Dec. 8, 1975)) a week before the committee report was filed. In that letter, the Department called for the repeal of "a number of State laws [which] still include special disqualifications for pregnancy or automatically consider unavailable for work any pregnant claimant" (*id.* at 2), and in an attached summary discussed statutory provisions of 19 states relating to pregnancy. See note 19, *infra*.

after the birth of a child,[17] and a second type that singles out and disqualifies women who leave work because they are pregnant.[18] Since the House Report stated that the bill was aimed at eliminating "special disqualification provisions pertaining to pregnancy," it seems clear that it was intended to prohibit states from enacting statutes that single out pregnancy for special treatment, and not to prohibit states from enforcing neutral rules that do not specifically relate to pregnancy, like the Missouri rule at issue here.[19]

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[17] The provision of the Utah unemployment compensation statute invalidated on constitutional grounds in *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975), illustrates this sort of rule. Utah Code Ann. § 35-4-5(h)(1) (1974) provided that a woman was disqualified for 12 weeks before the expected date of childbirth and for six weeks after childbirth, even if she left work for reasons unrelated to pregnancy. The claimant in *Turner*, for example, left work for reasons unrelated to pregnancy and received compensation for about four months until 12 weeks before she was expected to give birth. The Utah statute disqualified her from receiving compensation for the 18-week period following immediately thereafter. 423 U.S. at 44.

[18] Section 35-4-5(h)(2) of the Utah statute, which was not at issue in *Turner*, illustrates this sort of rule. Section 35-4-5(h)(2) provided that a woman was disqualified "when it is found by the commission that her total or partial unemployment is due to pregnancy." That provision meant that women who left work because they were pregnant were disqualified from receiving benefits until after they resumed working. See Unemployment Insurance Program Letter No. 1-76, at 4 (Feb. 4, 1976).

[19] Unemployment Insurance Program Letter No. 33-75, to which the House Report apparently referred in its statement that 19 states had special disqualification provisions pertaining to pregnancy (see note 16, *supra*), listed the Utah statute that specifically barred women who left work on account of pregnancy in its summary of "discriminatory state provisions relating to pregnancy." It appears from that summary that Arkansas, Colorado, Indiana, Minnesota, Montana, and Nevada also barred women who left work because they were pregnant from receiving unemployment compensation. The letter also listed the Utah statute that disqualified women from receiving unemployment compensation for an 18-week period around the date of childbirth in its summary of discriminatory

That Congress thus sought to eliminate only those state rules that single out pregnant women for disadvantageous treatment is echoed in the floor statement of the ranking minority member of the House subcommittee, who was also co-sponsor of the bill. He stated: "In an effort to eliminate a discriminatory practice directed against women, the bill prohibits States from denying benefits solely on the basis of pregnancy. This does not mean that all pregnant unemployed women will automatically receive unemployment compensation benefits. It simply means that pregnant women will no longer be denied benefits solely on the basis of their pregnancy. If a pregnant woman is available for work, able to work, and cannot find a job, *she ought to be treated no differently than any other unemployed individual available for work.*" 122 Cong. Rec. 22518 (1976) (remarks of Rep. Steiger (emphasis added)).

After the House issued its report, this Court announced its decision in *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975). The Court struck down Utah's statute providing that women were disqualified from receiving unemployment compensation for an 18-week period around the date of childbirth on the ground that such a conclusive presumption of incapacity was violative of due process.

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state provisions. It appears from the summary that Kansas, Montana, New Jersey, Rhode Island, and West Virginia also had rules barring women from receiving unemployment compensation for a period around the expected date of childbirth. While the summary also mentioned a few other miscellaneous sorts of provisions directed specifically at pregnancy, it did not mention Missouri, even though Missouri had barred women who left work on account of pregnancy, like all other workers who left work for reasons unrelated to their employment, from receiving unemployment compensation at least since 1960 (see *Bussman Mfg. Co.* v. *Industrial Comm'n, supra*). Nor did the summary list any other state with a rule like Missouri's, such as the South Carolina provision at issue in *Porcher*.

The Senate Report referred to this Court's decision in *Turner* in a way that helps to clarify the meaning of Section 3304(a)(12): "In a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits. In 1975 the Supreme Court found a *provision of this type* in the Utah unemployment compensation statute to be unconstitutional. * * * A number of other States have similar provisions although most appear to involve somewhat shorter periods of disqualification." S. Rep. 94-1265, *supra*, at 19, 21 (emphasis added).[20]

Nothing in the Senate Report, or elsewhere in the legislative history, indicates that Congress focused on, much less intended to eliminate, neutral state

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[20] Petitioner argues that Section 3304(a)(12) should be construed to mandate preferential treatment for women who leave work on account of pregnancy since, in her view, it otherwise merely codifies *Turner* and "Congress should not be presumed to have adopted useless or unnecessary legislation" (Br. 21). As an initial matter, it would not necessarily be unreasonable to assume that Congress intended that provision to strike down only the same sorts of state statutes that this Court invalidated in *Turner* since Section 3304(a)(12) had been introduced before the Court's decision. In addition, the Court's holding in *Turner*—that "a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid" (423 U.S. at 46)—appeared to hold open the question whether shorter periods of automatic disqualification were permissible, while Section 3304(a)(12) bars automatic pregnancy disqualification provisions of any length.

In any event Section 3304(a)(12) clearly did more than codify *Turner*. As the House report had noted, Section 3304(a)(12) was intended to invalidate two types of state statutes, and this Court only addressed one of those types of statutes in *Turner*, the type that involved a period of mandatory disqualification around the date of childbirth. The Court did not address in *Turner*—but Section 3304(a)(12) clearly invalidates—statutes that specifically relate to pregnancy and disqualify women who leave work on account of pregnancy from receiving unemployment compensation, while other similarly situated individuals remain eligible for benefits.

rules such as Missouri's that treat women who leave work on account of pregnancy the same as others who leave work for reasons unrelated to their employment.[21] On the contrary, the Senate Report emphasized that "[p]regnant individuals would * * * continue to be required to meet generally applicable criteria of availability for work and ability to work" (S. Rep. 94-1265, *supra*, at 21).[22]

In sum, the legislative history evidences only congressional concern to prohibit rules specifically concerned with pregnancy, does not contain any hint that Congress intended to mandate preferential treatment for women on account of pregnancy, and to the contrary emphasizes that states may enforce neutral rules relating to eligibility for benefits. We therefore believe that Congress intended no prohibition of neutral state rules that disqualify women who leave work on account of pregnancy only as part of a much larger group disqualified because they left for reasons unrelated to their employment.[23]

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[21] Petitioner's argument (Br. 19-20) that the legislative history supports her contention that Section 3304(a)(12) is not an anti-discrimination provision but instead mandates preferential treatment is without merit. Petitioner notes that an early version of the provision that became Section 3304(a)(12) contains language almost identical to the language that was enacted and also, following the word "and," further provided that " 'determinations under any provision of such State law relating to voluntary terminations of employment, availability for work, active search for work or refusal to accept work shall not be made in a manner which discriminates on the basis of pregnancy' " (Br. 19 (emphasis omitted)). Petitioner contends that the deletion of this second clause shows that the provision mandates preferential treatment for pregnant women. But nothing in the legislative history indicates that the deletion of this lengthy and redundant second clause was intended or understood to change the meaning of the provision. Moreover, we do not understand how the deletion of a clause following the word "and" could change the meaning of the clause that preceded the word "and," as petitioner contends.

[22] Similarly, a 1976 committee print stated that "[p]regnant individuals will * * * continue to be required to meet generally applicable criteria of seeking work, availability for work, and ability to work" (Staffs of the Senate Comm. on Finance and the House Comm. on Ways and Means, 94th Cong., 2d Sess., *Unemployment Compensation Amendments of 1976*, at 6 (1976)). A committee print prepared in 1975 stated that "special disqualifications because of pregnancy [are] discriminatory and unnecessary" (Staff of House Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means, 94th Cong., 1st Sess., *Information to Accompany H.R. 10210*, at 12 (1975).

[23] Moreover, the historical context in which Section 3304(a)(12) was adopted also indicates that Congress intended Section 3304(a)(12) to require that women who leave work on account of pregnancy be treated the same as other workers, and not that they receive preferential treatment. There was a vigorous debate during the 1970s concerning the treatment of pregnant women in employment matters. Broadly speaking, the debate was whether pregnant women should be singled out for disadvantageous treatment because, unlike most disabled persons, the disability suffered by pregnant women is in some sense voluntary. This Court upheld employer disability plans that excluded pregnant women from coverage in cases involving constitutional (*Geduldig* v. *Aiello*, 417 U.S. 484 (1974)) and statutory attack (*General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976)).

Critics of this Court's position contended that pregnant women should be treated like other disabled workers, and their position prevailed in Congress when it adopted the Pregnancy Discrimination Act of 1978, which in part amended Title VII of the Civil Rights Act of 1964 to provide that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work" (42 U.S.C. 2000e(k)). The position that petitioner advocates—that pregnant women must be treated better than other disabled persons—was not one generally pressed in the 1970s when the Pregnancy Discrimination Act and Section 3304(a)(12) were adopted. Rather, the debate was whether pregnant women should be protected against treatment less favorable than that received by other disabled workers. Accordingly, we do not think that it is realistic to suppose that Congress intended to mandate preferential treatment.

C. Petitioner's construction of Section 3304(a)(12) unreasonably restricts the broad discretion that Congress intended the states to have in determining eligibility for unemployment compensation

In our view the language and legislative history of Section 3304(a)(12) make clear that Congress did not intend to prohibit Missouri from enforcing the disqualification provision at issue here against women who leave their jobs on account of pregnancy. In any event, a presumption arises from the structure and cooperative scheme of the unemployment compensation system that state rules are permissible in the absence of clear intent on the part of Congress to limit state discretion, and nothing in the language or history of Section 3304(a)(12) appears to challenge that presumption here.

In enacting Titles III and IX of the Social Security Act in 1935, Congress envisioned the unemployment insurance program as a cooperative federal-state program in which states would take primary responsibility for the design and administration of the program within their own jurisdictions. The Senate Report states that "[e]xcept for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." S. Rep. 628, 74th Cong., 1st Sess. 13 (1935).[24] This Court has recognized that Congress

[24] See also *Report of the Committee on Economic Security, reprinted in Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 1326 (1935), which makes clear the Congressional intention: "The plan for unemployment compensation that we suggest contemplates that the States shall have broad discretion to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States."

gave "[a] wide range of judgment * * * to the several states as to the particular type of statute to be spread upon their books." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 593 (1937). See also *Baker* v. *General Motors Corp.*, No. 85-117 (July 2, 1986), slip op. 11-14; *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519, 537 (1979) (plurality opinion). For the most part, decisions regarding eligibility, disqualification, waiting periods, benefit rates, and similar issues have been the province of the states. See *Baker* v. *General Motors Corp.*, *supra*; *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 483-484 (1977). More specifically, this Court has noted that both the states and Congress have been concerned with protecting the fiscal integrity of state unemployment insurance programs (431 U.S. at 492-493) and with the possibility that states might provide for eligibility greater than their funds can handle (*id.* at 484).[25]

In light of Congress's "sensitiv[ity] to the importance of the States' interest in fashioning their own unemployment compensation programs" (*New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. at 539), the fundamental standards

[25] This Court has recognized that "even involuntary unemployment is not always a *sufficient* condition to qualify for benefits" under state law (*Baker* v. *General Motors Corp.*, slip op. 12, discussing *Ohio Bureau of Employment Services* v. *Hodory*, *supra* (emphasis in original)). In expending its finite resources, a state is plainly permitted, absent a specific prohibition in the applicable federal laws, to deny benefits to "innocent" persons unemployed through no fault of their own. See *Baker* v. *General Motors Corp.*, *supra* (Michigan statute disqualified persons who paid special union dues to strike fund and were ultimately laid off as a result of strikes at other plants that were financed by the fund); *Ohio Bureau of Employment Services* v. *Hodory*, *supra* (Ohio statute disqualified person who was laid off when his plant was closed due to shortage of fuel caused by strike at coal mine owned by his employer).

contained in 26 U.S.C. (& Supp. II) 3304 and 42 U.S.C. (& Supp. II) 503 must be construed to give the states great latitude in designing their own programs. See, *e.g.*, *Watkins* v. *Cantrell*, 736 F.2d 933, 939 (4th Cir. 1984) (construing 26 U.S.C. 3304(a)(15)). Section 3304(a)(12) should therefore be read to preserve as much as possible of the states' discretion while fulfilling Congress's intent in its enactment.

Petitioner's interpretation of Section 3304(a)(12), which would bar the application of certain neutral state rules (but not others) on the ground that some of those impacted are presently or formerly pregnant women, significantly intrudes upon the states' discretion and impairs their ability to frame a system of unemployment compensation. Such an interpretation imposes a burden of preferential treatment for pregnant women, which is costly to the state. It also creates uncertainty as to how one would distinguish between neutral rules which would be permissible, such as the requirements that claimants be able and available for work, and those which would not, such as the Missouri rule at issue here.

Since Congress clearly meant to leave the states free from unnecessary federal interference in furthering their own particular policies through their unemployment compensation systems, such an interpretation should not be accepted in the absence of a clear indication of congressional purpose. Yet, as we have shown, petitioner's construction finds no support in the language of Section 3304(a)(12), and there is no suggestion in the legislative history that Congress intended to mandate preferential treatment of pregnant women by the states. There is therefore no warrant for construing Section 3304(a)(12) to forbid treatment of pregnant women on the same terms as other workers who voluntarily relinquish their jobs

for reasons unrelated to their work or their employer.[26]

D. Deference should be given to the Department of Labor's consistent interpretation of Section 3304(a)(12) as barring only pregnancy-specific disqualifications

The Department of Labor has consistently interpreted Section 3304(a)(12) to prohibit states from singling out pregnancy as the sole basis for denying benefits, and has never required states to accord preferential treatment to pregnant or recently pregnant claimants. In 1976, shortly after the enactment of Section 3304(a)(12), the Department's Unemployment Insurance Service[27] issued instructions to the states for implementing its provisions. The Department stated that "[i]t is necessary that any provision specifically relating to pregnancy in the determination of entitlement to benefits be deleted" from state statutes or regulations (*Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-556*, at 62 (1976) [hereinafter cited *1976 Amendments*]). The Department explained that Section 3304(a)(12) "requires that the entitlement to benefits of pregnant

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[26] In light of the discretion given the states in fashioning their unemployment compensation programs, petitioner's arguments disputing the wisdom of Missouri's policy as petitioner perceives it—that Missouri improperly treats pregnancy as an illness (Br. 26), that Missouri improperly regards pregnancy as a voluntary condition (Br. 27), and that Missouri improperly treats a claimant on a leave of absence without guarantee of reinstatement as one who has voluntarily terminated employment (Br. 27-28)—are appropriately addressed to the Missouri legislature, not to this Court.

[27] The Unemployment Insurance Service is a unit within the Labor Department's Employment and Training Administration. The Service, which is headed by a Director (formerly Administrator), is responsible for reviewing state laws and their application to determine whether the states conform to and substantially comply with the federal standards set forth in the Federal Unemployment Tax Act and the Social Security Act.

claimants be determined on the same basis and under the same provisions applicable to all other claimants. It does not mean that pregnant claimants are entitled to benefits without meeting the requirements of the law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether she meets the statute's conditions for receipt of benefits." *1976 Amendments* 62.[28] The Department thus emphasized that under Section 3304(a)(12) women could not be singled out for disadvantageous treatment on account of pregnancy.[29]

In a subsequent communication to the states the Department addressed the question whether pregnant claimants could be treated more favorably than other claimants. The Department noted that the states had various rules regarding the treatment of "claimants who must leave their jobs because of illness or injury, including pregnancy" (*Supplement No. 1 to 1976 Draft Language and Commentary* 26 (Dec. 7, 1976)). The Department stated that Section 3304(a)(12) "does not speak to treating pregnant claimants more favorably. It only requires that they not be disqualified solely on the basis of pregnancy or its termination." *Ibid.* The Department thus concluded that Section 3304(a)(12) allowed states to construe their disqualification rules in a manner that found pregnant women eligible for benefits even in cases where other claimants would not be eligible, but that it did not mandate such preferential treatment.

[28] The Department's construction of the pregnancy provision was consistent with a series of Labor Department directives issued to the states over the preceding six years, calling on them to eliminate from their laws any provisions discriminating against claimants on the basis of sex, and particularly recommending the repeal of provisions "subjecting pregnant and post-pregnant women to more stringent eligibility conditions than are applied for disabilities common to both sexes." Unemployment Insurance Program Letter No. 1097, at 3 (Dec. 31, 1970). See also Unemployment Insurance Program Letter No. 1186 (May 12, 1972); Unemployment Insurance Program Letter No. 33-75, *supra*; Unemployment Insurance Program Letter No. 1-76, *supra*.

[29] Petitioner claims (Br. 33), based on telephone conversations with state officials, that Minnesota and North Dakota apply facially neutral rules in ways that disadvantage pregnant claimants compared with persons disabled by illness. Petitioner cites no state administrative or judicial decisions in support of this assertion. As explained more fully, *infra* (at note 32), the Department typically scrutinizes such decisions, as well as state laws and regulations, as part of its annual certification process. As also noted, *infra*, however, certification does not, in any event, constitute affirmative approval of all practices followed by a state. If in fact Minnesota and North Dakota are singling out pregnant women for disadvantageous treatment, then they are not complying with Section 3304(a)(12).

The Department specifically affirmed these views in a 1980 letter from the Administrator of the Unemployment Insurance Service to the South Carolina unemployment compensation agency solicited during the litigation of *Brown* v. *Porcher*, *supra*, and included in the record of that case (C.A. App. at 131-133). The letter addressed the validity of a South Carolina rule which, like the Missouri rule at issue here, disqualified all claimants who left their employment for a reason not related to the work or to the employer.[30] The claimant in *Brown* v. *Porcher* contended, as does petitioner, that under Section 3304(a)(12) a pregnant claimant is entitled to benefits after her pregnancy has ended and she is able and available for work. The Department rejected this argument, con-

[30] The letter noted that "[u]nder South Carolina law, a claimant who separates from employment because of illness is deemed to have voluntarily left work without good cause attributable to the employment. This is true also with respect to pregnancy which under South Carolina law is treated as an illness." C.A. App. at 132, *Brown* v. *Porcher*, *supra*.

cluding that "South Carolina law as interpreted by the State Employment Security Commission is not inconsistent with the Federal requirements of Section 3304(a)(12) FUTA, because so applied it does not distinguish between pregnant claimants or any other unemployed individuals whose separation is determined to be due to illness" (C.A. App. at 132).[31] Accordingly, in the Administrator's view states like Missouri are in compliance with federal standards.[32]

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[31] The Fourth Circuit in *Brown* v. *Porcher, supra,* gave little weight to the Administrator's letter, citing his failure to support his interpretation with pertinent authority or legislative history (660 F.2d at 1004-1005). It must be noted, however, that the Labor Department did not participate as either party or amicus before the court of appeals in that case and thus the court had a limited opportunity to consider the longstanding and consistent nature of the Department's interpretation or its basis in the legislative history. In an amicus brief filed with this Court in opposition to the petition for a writ of certiorari in *Porcher,* the Department fully supported and explained its view that Section 3304(a)(12) was not meant to require extension of benefits "to those who leave work voluntarily for a host of reasons [including pregnancy] that are not employment-related," but rather was intended "to ban only those state laws that single out pregnancy for disadvantageous teratment" (Amicus Br. at 8 (footnote omitted)).

[32] As petitioner accurately observes (Br. 31-33), the Department's annual certifications of Missouri under 26 U.S.C. 3304(c) do not foreclose its further consideration and possible disapproval of the provisions in the state law. Petitioner's further assertion (Br. 32-33) that the Labor Department does not look behind the state statutory language in reviewing state conformity and compliance with Federal Unemployment Tax Act and Social Security Act provisions is, however, erroneous. In determining whether a state is in compliance with federal standards, the Secretary examines both state statutes on their face and as interpreted by state administrative and judicial bodies. See 20 C.F.R. 601.3 (states must submit to the Secretary "all relevant State materials, such as statutes, executive and administrative orders, legal opinions, rules, regulations, interpretations, court decisions"). While the Department's objections to a state law are thus indicative of the Department's interpretation of the state law both on its face and as interpreted, the mere fact that a state has been certified by the Secretary under the Federal Unemployment Tax Act does not constitute Labor Department acquiescence in the state's interpretation or application of the state law in any case. The Department reserves the right to raise pertinent conformity issues in a subsequent year if, for example, an improper interpretation of the state's law had not come to the Department's attention or there was insufficient time for federal and state officials to confer on the issue.

Because the Department of Labor has the primary responsibility for overseeing compliance with the federal standards governing state unemployment compensation laws (see *Porcher* v. *Brown,* 459 U.S. at 1151-1152 (White, J., dissenting from the denial of certiorari)), its interpretation of Section 3304(a)(12) is entitled to considerable deference. See, *e.g., Young* v. *Community Nutrition Institute,* No. 85-664 (June 17, 1986), slip op. 6; *North Haven Board of Education* v. *Bell,* 456 U.S. 512 (1982); *E.I. duPont de Nemours & Co.* v. *Collins,* 432 U.S. 46, 54-55 (1977); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Indeed, to the extent that Section 3304(a)(12) is silent or ambiguous with respect to its effect on the Missouri rule at issue here, this Court need only determine whether the Labor Department's interpretation of the statute it administers "is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984) (footnote omitted). Considering the broad discretion Congress gave the states in fashioning their unemployment compensation programs and Congress's clear intention not to exempt pregnant women from those criteria of entitlement applicable to other claimants, the Labor Department's interpretation of 26 U.S.C. 3304(a)(12) is a reasonable one that is supported by the statutory language and the relevant statements of legislative intent. See *St. Martin Evangelical Lutheran Church* v. *South Dakota,* 451 U.S. 772, 783 n.13 (1981). Its interpretation is especially

worthy of deference where, as here, the Department was involved in the proceedings that led to the enactment of Section 3304(a)(12) and it has interpreted the provision consistently since its enactment.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submittted.

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AMICUS CURIAE

BRIEF

No. 85-129

In The
Supreme Court of the United States
October Term, 1985

LINDA WIMBERLY,
Petitioner,

v.

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI, ET AL.,
Respondents.

On Writ of Certiorari
To the Missouri Supreme Court

BRIEF OF EQUAL RIGHTS ADVOCATES, CALIFORNIA WOMEN LAWYERS, SAN FRANCISCO WOMEN LAWYERS ALLIANCE, AND TRACY GOUDY, AMICI CURIAE ON BEHALF OF PETITIONER

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BRIEF FOR EQUAL RIGHTS ADVOCATES, ET AL., AS AMICI CURIAE

This brief amici curiae is filed with the written consent of all parties pursuant to Rule 36. The letters of consent have been filed with the clerk.

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INTEREST OF AMICI CURIAE

This amici curiae brief is filed on behalf of Equal Rights Advocates, California Women Lawyers, the San Francisco Women Lawyers Alliance, and Tracy Goudy in support of petitioner, Linda Wimberly. The three organizational amici have advocated actively for an end to sex discrimination. In particular, they are concerned with securing economic equality for women. Through their contact with women who have lost their jobs because of pregnancy-related disabilities, amici have become familiar with the particular hardships faced by pregnant women for whom unemployment compensation may constitute a substantial portion of their financial resources.

Equal Rights Advocates ("ERA") is a San Francisco-based public interest legal and educational corporation specializing in the area of sex discrimination. Since its inception over twelve years ago, ERA has litigated cases aimed at the promotion of equality of the sexes under law, and has worked to ensure the equal employment opportunity rights of pregnant women and the enforcement of state and federal legislation enacted to guarantee pregnant women freedom from discrimination. Through its contact with hundreds of women each year who call the organization

for advice, ERA has found that unless women's unique procreative role is accommodated, they will continue to be disadvantaged in their employment.

California Women Lawyers ("CWL") is a statewide bar association representing the interests of the approximately 15,000 women lawyers in the State of California. It has both individual members and 24 local affiliates throughout the state. CWL's membership includes both male and female lawyers, judges and law students, all of whom are concerned with the legal rights of and equal treatment for women. A woman's right to bear and raise children without serious economic harm—the issue now before this Court—is part and parcel of her right to participate equally in the workforce.

The San Francisco Women Lawyers Alliance is a bar association primarily comprised of women lawyers living and practicing in the San Francisco Bay Area. One of the principal purposes of the Alliance is to advocate on behalf of women in the community. The organization has filed a number of amicus briefs and has lobbied for state and local legislation affecting economic and employment opportunities for women. The Alliance is committed to assuring that all women are provided equal employment opportunities, including women who are disabled due to pregnancy.

This brief is also filed on behalf of an individual, Tracy Goudy. Ms. Goudy is a resident of Los Angeles who is currently unemployed. She is of childbearing age and is currently receiving unemployment insurance compensation.

———o———

SUMMARY OF ARGUMENT

This Court should forbid Missouri from denying unemployment insurance coverage to women who lose their jobs because of pregnancy. In enacting § 3304(a)(12) of the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (1982), Congress mandated that "no person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy." Amici submit this brief to set forth the correct theoretical framework to apply in this case and others involving employment-related pregnancy discrimination.

In passing § 3304(a)(12) Congress sought to promote the twin goals of eliminating discrimination against pregnant women in the paid workforce and permitting women to fulfill their unique biological role and bear children. Missouri's unemployment insurance law as interpreted by the Missouri Supreme Court would thwart these fundamental goals. It would deny coverage to previously pregnant women who find their jobs are no longer available when they are ready to return to work. Missouri disqualifies from benefits women who have left their jobs for pregnancy-related causes. It claims that equal protection and nondiscrimination principles require identical treatment of these women and workers disabled by other causes. Because it denies coverage to other workers who voluntarily quit their jobs, Missouri claims it can also deny benefits to workers forced to leave work because of pregnancy.

The state misinterprets the intent of § 3304(a)(12) and ignores the impact of pregnancy discrimination. To achieve equality, the proper comparison is not between

pregnancy and disability, but between men and women who have engaged in reproductive conduct. A comparison to disability equates pregnancy with illness while ignoring the fundamental role of childbirth to a continuing society. Only by recognizing and accommodating women's unique biological role can the dual goals of equality and reproductive freedom be met.

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ARGUMENT

I. SECTION 3304(a)(12) ENSURES EQUALITY BETWEEN MEN AND WOMEN WHO ENGAGE IN REPRODUCTIVE CONDUCT AND LOSE THEIR JOBS BECAUSE OF THAT CONDUCT

The consequences of pregnancy for a paid member of the workforce implicate two important public policies. The first is the need to equalize employment and economic opportunities for men and women. Both Congress and this Court have recognized the importance of guaranteeing equality between the sexes by enacting and upholding laws which strive to eliminate discrimination in employment because of sex. *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1964); Equal Pay Act, 29 U.S.C. § 206(d) (1963); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Both forums also have acknowledged the unique role procreation and family life play in society. This Court in particular has noted that freedom of personal choice in reproductive matters is one of the liberties protected by the Due Process Clause. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 (1974); *see also*

Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation). On its part, Congress has adopted the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982), which prohibits discriminatory treatment in the workplace due to pregnancy. Both the legislative and judicial branches thus have acknowledged the unique problems women face when they become pregnant.

In furtherance of both policies, Congress enacted § 3304(a)(12) of the Federal Unemployment Tax Act. The statute provides that for a state to receive credit for employer contributions to its unemployment program, "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy." 26 U.S.C. § 3304(a)(12). Thus, if a woman satisfies the other requirements of her state's unemployment program, she will be eligible for benefits regardless of her pregnant status. By prohibiting discriminatory treatment on the basis of pregnancy, § 3304(a)(12) fosters equal employment opportunity between the sexes.

Missouri's statute disqualifies claimants from unemployment benefits where the employee "has left his work voluntarily without good cause attributable to his work or to his employer." Mo. Rev. Stat. § 288.050.1(1) (1978). The Labor and Industrial Relations Commission of Missouri (the "Commission") contends that the statute is not discriminatory on its face and, thus, does not conflict with the federal statute. (Commission's Brief in Opposition to Petition for Writ of Certiorari, at 2 ("Commission's Brief")). Its application, however, has the same impact on pregnant claimants as one which creates a presumption

of incapacity and unavailability for employment. A pregnant employee who loses her job as a result of her pregnancy (and thus, under the state's interpretation, without good cause attributable to her work) will be denied benefits even if she is ready, willing, and able to work. The sole reason for her denial will be her pregnant condition. Clearly, this result violates both the plain language and broad mandate of § 3304(a)(12) and perpetuates the discriminatory treatment Congress intended to prohibit. *See Brown v. Porcher*, 660 F.2d 1001, 1004 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

The Commission attempts to circumvent this conclusion by arguing that the Missouri statute does not single out pregnant women for differential or discriminatory treatment. (Commission's Brief at 7) It reaches this result by comparing pregnant claimants to all other disabled claimants. This interpretation thwarts public policy by making the wrong comparison.

The Commission's interpretation places the two public policies of promoting economic equality between the sexes and permitting freedom of choice in reproductive matters in conflict. If a statute creates a presumption about pregnant women, women will be denied benefits to which, but for their pregnancy, they will otherwise be entitled. *See Turner v. Department of Employment Security*, 423 U.S. 44, 46 (1975). Such a statute perpetuates the historic inequality in employment opportunities between men and women. If, however, a statute completely ignores the unique reproductive role of women, it will inhibit freedom of choice in reproductive matters. Women will be

forced to choose between continued employment and bearing children.

One way to avoid this result, and further the goals for which § 3304(a)(12) was adopted, is to define the categories of comparison appropriately. In situations where the biological differences between the sexes are directly involved, the comparison should be between women who engage in reproductive conduct and men who engage in reproductive conduct. Although both sexes participate in the same activity, the consequences of their conduct, and the subsequent impact on their employment, differ dramatically.

II. TO ENSURE EQUALITY BETWEEN MEN AND WOMEN, WOMEN'S PROCREATIVE ROLE MUST BE ACCOMMODATED

Section 3304(a)(12) was enacted to ensure that women who become pregnant do not suffer employment-related penalties as a result of their pregnancy. Any women who becomes pregnant will have to leave work for some period of time. Under the Missouri Supreme Court's interpretation of its state unemployment compensation statute, such a woman will be economically penalized if her job is no longer available when she is ready, willing and able to return to work. It is at this time, when a woman most needs income to support a new family member, that Missouri denies a woman unemployment insurance benefits.

Men and women in the paid workforce face very different consequences if their reproductive conduct results in pregnancy. A woman will, by necessity, be forced to take time off from work. A man's reproductive conduct, how-

ever, will not affect his work life. He will not be forced to leave his job, even for a limited period of time, to give birth to a child. To create equality between the sexes, this biological difference must be recognized and accommodated.

The Commission argues that its state statute does not violate § 3304(a)(12) because it treats pregnant women claimants the same as all other disabled claimants. (Commission's Brief at 7) It asserts that petitioner's interpretation of § 3304(a)(12) would result in discrimination against those who leave their employment for health reasons and subsequently become ineligible for unemployment benefits. In applying § 3304(a)(12) to state unemployment laws,[1] the comparison should not be between pregnant claimants and all other disabled claimants. This comparison ignores both the consequences of women's reproductive conduct and the man's role in procreative activities.

The appropriate comparison to make in cases involving pregnancy-related discrimination is between women who have engaged in reproductive conduct and men who have engaged in reproductive conduct. These groups are similarly situated because both participate in the procreative process. Only these groups can exercise personal choice in matters of reproduction. Pregnant women and all other disabled claimants do not share any such similarities.

This approach allows courts to compare the different consequences to men and women who engage in reproductive

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[1] Missouri's statute which denies unemployment benefits to employees who leave "work voluntarily without good cause attributable to his work or his employer" is not unique. *See, e.g.*, Ga. Code § 34-8-158(1) (1984); La. Rev. Stat. Ann. § 23:1600(1) West (1985); N.J. Rev. Stat. § 43:21-5(a) (1985); N.C. Gen. Stat. § 96-14(1) (1983); and Wis. Stat. § 108.04(7) (1985).

conduct.[2] A woman who engages in reproductive conduct may become pregnant. Eventually, she will be required to take time off from work to give birth. A man who sires a child, by contrast, will never be forced to leave his employment as a result of his conduct.

Applying this analysis, Wimberly's interpretation of § 3304(a)(12) will not result in discrimination. Granting unemployment insurance benefits to a woman who has become pregnant will not discriminate against men who have also engaged in reproductive conduct. A married couple, for example, may choose to have a child. As a result of their reproductive conduct, the wife becomes pregnant. When she leaves her work temporarily to have the child, she may lose her job. Under Missouri's interpretation of its law, at the time she is ready, willing and able to return to work, she will be denied unemployment compensation. Her husband, in contrast, will not lose his job because of their joint decision to have a family, and will not need unemployment benefits.

Applying the episodic approach will also not disadvantage those who have not engaged in reproductive conduct in comparison to pregnant women. These groups are not similarly situated. The Commission compares pregnant

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[2] This approach has been named the "episodic" approach because it takes into account the biological differences between men and women only at the point in time when those differences affect an individual's capacity to work. At other times, there is no reason to differentiate between these groups. *See* Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berk. W.L.J. 1 (1985). Amici Curiae also have recommended the adoption of this approach to analyze pregnancy discrimination claims under Title VII. *See* Brief of Equal Rights Advocates, *et al.* filed with this Court in *California Federal Savings & Loan Association v. Guerra*, No. 85-494.

women to people disabled for other reasons and asserts that under Wimberly's interpretation of § 3304(a)(12) the latter are denied equal protection of the law. (Commission's Brief at 7) The fallacy in this argument arises from the Commission's limited view of pregnancy as a health problem. The fact that women who become pregnant sometimes exhibit some of the same symptoms as people who become ill, does not make pregnancy an illness or a disability. Pregnancy, as opposed to illness, is necessary to the continuation of society. Only through the creation of new generations can human life survive. Because of its unique role, this Court has defined freedom of choice in matters of family life as one of the liberties protected by the Due Process Clause. *See Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 639. Recognition of the importance of procreation to society also has led to the enactment of laws designed to assist women in their childbearing roles in 75 countries, including every industrialized country except the United States. These laws guarantee women temporarily disabled due to pregnancy job-protected leave and a cash benefit to replace all or part of lost wages.[3]

Congress, in enacting § 3304(a)(12), implicitly recognized that pregnancy is not an illness and need not be compared to disabilities in eligibility determinations for unemployment insurance benefits. Because women who are pregnant are not similarly situated to employees who are disabled for other reasons, Congress can require states to provide benefits to previously pregnant women without violating the Equal Protection Clause. Missouri has violated both the language and intent of § 3304(a)(12) by disqualifying pregnant women from unemployment coverage.

[3] S. Kamerman, A. Kahn, & P. Kingston, *Maternity Policies and Working Women* at 15 (1983).

III. PROVIDING UNEMPLOYMENT BENEFITS TO WOMEN WHO LOSE THEIR JOBS BECAUSE OF PREGNANCY FURTHERS THE CONGRESSIONAL INTENT BEHIND THE FEDERAL UNEMPLOYMENT TAX ACT

Missouri's statute conflicts with the broad social policy which seeks to prevent women who work outside their homes from being penalized by pregnancy. In enacting § 3304(a)(12) Congress adopted the enlightened view that women who become pregnant and lose their jobs should not be economically disadvantaged as a result. They should not forego their right to collect unemployment insurance benefits at the time they are ready, willing and able to return to work and most need the income. To prevent pregnant women from being disadvantaged, both their economic and maternal role must be accommodated. If a woman who bears a child faces a significant economic hardship as a result, her fundamental right to procreate will be hampered.

If this Court allows unemployment insurance programs to disqualify women who are forced to leave their jobs because of pregnancy, thousands of American women will face the financial hardship Congress intended to enjoin by passage of § 3304(a)(12). For many families, the continued need for the mother to provide financial support after childbirth is vital to the family's economic survival. Over 54% of all women were in the labor force as of 1984.[4] An

[4] Women's Bureau, U.S. Dept. of Labor, *The United Nations' Decade for Women 1976-1985: Employment in the United States* 13 (July 1985) (*"Decade for Women"*).

estimated 85 percent of these women will bear a child some time during their working lives. Because working women have an average of 2.6 children, they will need two to three maternity leaves during their childbearing years.[5]

Many women who are forced to leave work to bear children will find themselves without a job. One survey found that 28 percent of employers do not guarantee their employees the same or a comparable job upon return from maternity leave.[6] In smaller companies, 38 percent of workers were found not to have the right to return to work after bearing a child.[7] Allowing Missouri to maintain its policy of disqualifying recent mothers from unemployment coverage would encourage more employers to adopt restrictive leave policies because employers would not face the burden of increased payments into the state unemployment insurance fund.

Moreover, unemployment often imposes greater hardships on women than on men. While more women are working today than ever before, their share of earnings has not increased with their participation in the labor force. Women on average earn only 60 percent of what their male counterparts earn in similar positions. Earning smaller amounts while working prevents many women from saving for tougher times.

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5 Chaukin, *Walking a Tightrope: Pregnancy, Parenting and Work* 206, in Double Exposure: Women's Health Hazards on the Job and At Home (1984).

6 S. Kamerman, A. Kahn & P. Kingston, *Maternity Policies and Working Women* at 7 (Columbia University Press 1983).

7 Bernard Hodes Advertising, *Survey of U.S. Companies' Maternity, Paternity and Childcare Policies* App., Table IV.

In enacting § 3304(a)(12), Congress recognized the period of pregnancy and childbirth as a time of immense stress when families are particularly vulnerable to financial pressures. This is the time unemployment insurance benefits are most needed. The entry of an infant into the life of the new mother increases the family's financial requirements. Providing unemployment compensation at this time reflects the policies for which the program was adopted. "Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *California Department of Human Resources v. Java*, 402 U.S. 121, 131-32 (1971) (citation omitted).

The importance of unemployment insurance benefits at this time is even greater for the increasing number of families whose income depends solely on the mother's capacity to work. In 1984, over 10 million families (16% of all families) were headed by women.[8] Sixty-one percent of these women were in the labor force.[9] Female-headed households are particularly common in minority families. Forty-four percent of all black families and 23 percent of Hispanic families were headed by women as compared to 13 percent of all white families.[10] The majority of these households are below the poverty level.[11]

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8 *Decade for Women, supra* , at 25.

9 *Id.*

10 *Id.*

11 Bureau of the Census, U.S. Dept. of Commerce, Series P-60m No. 124, *Characteristics of the Population Below the Poverty Level: 1978*, reprinted in CURRENT POPULATION REPORTS (July 1980).

In addition to providing a family's sustenance while seeking a job, unemployment benefits may be a new mother's only means of paying for childbirth. Two-thirds of civilian women of childbearing age are covered only by group health insurance policies.[12] In most businesses, however, an employee loses health benefits upon her discharge. According to a 1982 Congressional Budget Office report, 11 million Americans lost health insurance coverage because the family breadwinner became unemployed.[13] Even if insurance coverage continues after a layoff, it lasts on average no more than one month.[14] Moreover, Medicaid and other public benefits programs are frequently unavailable because of strict eligibility requirements.[15]

Minority women are especially likely to lack insurance coverage. These women often find individual insurance plans prohibitively expensive, and they tend to work at lower paying jobs which do not offer group plans. A 1982 survey found that nine percent of the American population had no health insurance at all. The rates for blacks and Hispanics, however, were two to three times greater than for whites.[16] Fifty-one percent of blacks and 69% of

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12 R. Gold & A. Kenney, *Paying for Maternity Care*, 17 Family Planning Perspectives 103 (1985).

13 Peterson, *Lost Medical Care for Jobless: Cost May Be Health or Lives*, N.Y. Times (March 7, 1983).

14 G. Seib, *Recessions Cause Death Rate To Rise As Pressures of Coping Take Hold*, Wall St. J. (August 25, 1980).

15 Health Economics Research, *The Evolution of State Medicaid Programs* (1984).

16 J. Butler, *Updated Reports on Access to Healthy Care for the American People* (1983).

Hispanics report a problem finding money to pay for medical care compared to 25% of the general public.[17]

Inability to collect unemployment insurance benefits will have a devastating impact on a very large number of working women. Poverty will threaten the well-being of the families of women who lose their jobs because of pregnancy—especially those in female-headed households. Women whose jobs are not available when they are ready to return to work will also be denied the means of obtaining new employment. Without income they will be unable to afford the childcare, transportation, and other costs necessary to their employment search. This Court has already recognized unemployment insurance coverage as an integral part of an unemployed worker's efforts to find a new job. *California Human Resources Department v. Java*, *supra*, 402 U.S. at 132.

If Missouri and states with similar statutes are allowed to disqualify pregnant women from unemployment benefits, women will swell the ranks of the impoverished, creating a poverty class composed primarily of women and children. This thwarts the purpose for which § 3304 (a)(12) was enacted: to accommodate woman's dual role as wage-earner and childbearer. To further the long-standing practice of Congress of adjusting the Federal Unemployment Tax Act to reflect the changing realities of the workplace, this purpose must be upheld.

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17 G. Dallek, *Six Myths of American Medical Care*, 16 Health PAC Bulletin 9, 11 (1985).

CONCLUSION

For the foregoing reasons, amici curiae respectfully request this Court to reverse the decision of the Missouri Supreme Court and to hold that § 3304(a)(12) requires states to pay unemployment insurance benefits to women who are forced to leave their jobs because of pregnancy. Requiring payment of benefits to these women when they are ready, willing and able to return to work will fulfill the purpose for which the federal statute was enacted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LINDA WIMBERLY,

Petitioner,

—v.—

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL WOMEN'S POLITICAL CAUCUS, AND COAL EMPLOYMENT PROJECT, *AMICI CURIAE*

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IN THE
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LINDA WIMBERLY,

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THE LABOR AND INDUSTRIAL
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ON WRIT OF CERTIORARI TO THE
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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union, the National Women's Political Caucus, and the Coal Employment Project respectfully move for leave to file the attached brief amici curiae in this case. The consents of the attorneys for the parties were requested but refused.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. To help eliminate the pervasive problem of gender-based discrimination, the ACLU has established the Women's Rights Project, which has appeared before this Court in many pregnancy discrimination cases, including most recently as amicus curiae in California Federal Savings and Loan Association v. Guerra (No. 85-494).

The National Women's Political Caucus is a nationwide, multipartisan organization with

73,000 members, in over 300 state and local caucuses, dedicated to obtaining equal represenation of women in elective and appointive office and to speaking out on issues of direct concern to women. The elimination of sex-based employment and economic discrimination has been a central concern of the National Women's Political Caucus since its founding in 1971.

The Coal Employment Project ("CEP") is a non-profit organization formed in 1977 to perform educational and legal functions to eliminate the systematic sex discrimination in the coal mining industry. One of CEP's major undertakings in recent years has consisted of organizing for, and urging the United Mine Workers of America to adopt, as one of its collective bargaining positions in negotiation with coal mine operators, a decent gender-neutral maternity/paternity leave.

Amici have dedicated themselves in whole or in part to the advancement of the rights and interests of women in American society. Amici have been active participants in virtually all the major sex discrimination litigation in this Court, in Congressional efforts to remedy sex discrimination, in nationwide education efforts to inform lawmakers and others about sex discrimination, and in a variety of other endeavors on behalf of women.

This brief amici curiae is submitted on behalf of neither party and provides an analysis of the relevant statutory provision which differs in significant respects from the arguments made by the parties in the courts below. In particular, amici curiae focus on the prevalence of employment discrimination against pregnant women and new mothers, and the implications of this fact to the fair and non-discriminatory administra-

tion of the national unemployment insurance program.

The statutory interpretation proffered by amici, more fully discussed in the attached brief, will suggest a ground for remand not provided by either party.

Respectfully submitted,

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No. 85-129

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LINDA WIMBERLY,

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THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI; THE DIVISION OF EMPLOYMENT SECURITY OF THE STATE OF MISSOURI; J.C. PENNEY CO., INC.,

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ON WRIT OF CERTIORARI TO THE
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INTEREST OF AMICI CURIAE

The interest of amici curiae is set forth in the foregoing Motion for Leave to File Brief Amici Curiae.

SUMMARY OF ARGUMENT

Introduction

Once again this Court is asked to determine whether pregnant women or new mothers may be selectively granted benefits which are not available to other similarly-situated individuals.[1] The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §3301, et seq., imposes requirements on

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[1] See also California Federal Savings & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985), cert. granted, ___ U.S. ___, 106 S.Ct. 783 (1986) ("Cal Fed") and Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry, 692 P.2d 1243 (Mont. 1984), appeal docketed, 53 U.S.L.W. 3718 (U.S. Mar. 27, 1985) (No. 84-1545).

participating state unemployment insurance ("UI") programs, including a requirement that UI benefits not be denied "solely on the basis of pregnancy or termination of pregnancy." 26 U.S.C. §3304(a)(12). The question in this case is a simple one of statutory construction as to whether the quoted language requires states to provide women affected by pregnancy the same benefits provided other similarly-situated claimants, or whether states must provide benefits to women affected by pregnancy even if others in comparable circumstances are denied benefits.

Amici herein analyze this question differently from either party. Unlike the State of Missouri, which apparently interprets §3304(a)(12) to prohibit only special written disqualifications of pregnant (or recently pregnant) claimants, we read the statute to impose on states the duty to insure that intentional pregnancy-based

discrimination in any form by either the state or the employer does not deprive women of UI benefits. Unlike Wimberly, we find no intent in §3304(a)(12) or its legislative history to create a special category or entitlement for pregnant or formerly pregnant claimants. Given the potential for pregnancy-based distinctions to deprive women of concrete benefits granted others in similar situations, such an intent should not be lightly inferred.[2]

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[2] See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974) and Gilbert v. General Electric Co., 429 U.S. 125 (1976). Pregnancy-based distinctions, even if purportedly beneficial, reinforce sex-based stereotypes and the tendency to resort to sex-based classifications, when functional neutral classifications would serve the intended purposes as well or better. Compare Orr v. Orr, 440 U.S. 268 (1979) and Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) with Hoyt v. Florida, 368 U.S. 57 (1961). The historical experience with sex and pregnancy specific classifications, which have so often worked against women, provided an ample foundation for the Congressional decision to adopt a principled adherence to equality of the sexes as reflected particularly in the Pregnancy Discrimination Act ("PDA"), an amendment to Title VII of the Civil Rights Act of 1964, P.L.95-555, 92 Stat. 2078 (1978), 42 U.S.C. §2000e(k). See (footnote cont'd)

Thus, while §3304(a)(12) prohibits all forms of intentional pregnancy-based discrimination, whether overt or covert, it does not grant pregnant women or new mothers an automatic entitlement to benefits in all circumstances. However, because employment discrimination against such women is still so pervasive, effective implementation of §3304(a)12) will likely result in many more women receiving benefits and will also deter employers from discriminatorily separating these women from employment.

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Under the Missouri UI system, an employee who leaves work because of illness, disability, or temporary physical incapacity

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Brief of the American Civil Liberties Union, League of Women Voters of the United States, League of Women Voters of California, National Women's Political Caucus, and Coal Employment Project, Amici Curiae ("ACLU Brief") in Cal Fed, at pp. 10-23, 33-35, 36-42.

not attributable to the workplace is disqualified from receiving UI benefits because s/he is deemed to have left "voluntarily without good cause attributable to his work or to his employer." Mo. Rev. Stat. §288.050.1 (1). The Missouri Supreme Court characterized the "manifest legislative" intent of the statute "to disqualify claimants who, like respondent, left work for reasons that, while perhaps legitimate and necessary from a personal standpoint, were not causally connected to the claimant's work or employer."[3]

Missouri thus disqualifies a large number of employees whose separation from work is justifiable in every respect, but is

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[3] Wimberly v. Labor & Indus. Rels. Comm. of Mo., et al.., 688 S.W.2d 344 (Mo. 1985), cert. granted, 54 U.S.L.W. 3697 (U.S. Apr. 21, 1986) (No. 85-129), Petition for a Writ of Certiorari to the Missouri Supreme Court (hereafter "Pet. for Cert."), at A5. The employer causation said to be missing in this case would, of course, be supplied if the employer discriminatorily denied petitioner reinstatement.

not attributable to the workplace or the employer. In this respect, the system leaves much to be desired.[4] While nothing on the face of §3304(a)(12) or its legislative history indicates that the gross deficiencies in Missouri's UI system can be addressed by selectively favoring women, see Point I, infra, it would be contrary to the plain import of §3304(a)(12) to assume that it affords women no rights absent a gratuitous declaration that the state or the employer discriminates on the basis of pregnancy. Instead, §3304(a)(12) provides a mandate to states to insure that intentional discrimination against pregnant women and new mothers

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[4] Two bills pending in Congress would resolve this problem by providing job security, on a gender-neutral basis, to all employees temporarily unable to work because of physical or medical reasons. The Parental and Medical Leave Act of 1986, H.R. 4300 and S. 2278. These proposals were stimulated in part by the concern of some legislators that a sex-specific approach is unlawful and is, in any event, an inadequate response to the problems encountered by all workers.

does not affect the availability of UI benefits. See Point II, infra. The federal law imposes a duty on states to ascertain minimal facts necessary to determine whether a pregnant woman or new mother is unemployed and thus seeking benefits as a result of the employer's discriminatory conduct. The states must likewise insure that their own personnel do not selectively harass, intimidate, or scrutinize the claims of such women,[5] and that state officials' own assumptions about employer's policies or intentions do not prejudge the matter at issue, substitute for evidence, and ultimately shield unlawful conduct.

Effectuation of Congressional intent underlying §3304(a)(12) requires a remand of this case to determine 1) whether the employer intentionally discriminated against

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[5] This has been a persistent problem, notwithstanding its patent illegality. See pp. 25-27, infra.

the claimant either by discriminatorily denying her reinstatement, by contesting her claim for benefits, or otherwise; and 2) whether the Missouri UI system discriminates in its treatment of pregnant women and new mothers by examining their claims more carefully or otherwise.

ARGUMENT

I. §3304(a)(12) WAS INTENDED TO ELIMINATE DISCRIMINATION AGAINST PREGNANT WOMEN AND NEW MOTHERS, BUT DOES NOT ACCORD THEM PREFERRED STATUS UNDER THE LAW

The legislative history of §3304(a)(12), like that of the prohibition on sex discrimination contained in Title VII of the Civil Rights Act of 1964, is scant. However, just as this Court has been able to glean from Title VII's language and general purposes a legislative intent to prohibit sex discrimination in employment in its many manifestations,[6] the more extensive legislative history of §3304(a)(12) reveals as clear a legislative desire to eradicate pregnancy-related discrimination in the

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[6] See, e.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), Dothard v. Rawlinson, 433 U.S. 321 (1977), Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978), Meritor Savings Bank v. Vinson, 54 U.S.L.W. 4703 (U.S. June 19, 1986).

operation of the nation's unemployment insurance system.

The proposal which was subsequently enacted as §3304(a)(12) was introduced in Congress in the summer of 1975, as part of more comprehensive revisions in the UI statute.[7] The initial stimulus for the decision to include a pregnancy discrimination prohibition is not apparent in early reports of the bill. It is plausible that the members were acutely aware of the pervasiveness of sex discrimination, and in particular of discrimination against pregnant workers and new mothers, from a series of decisions from this Court, see Phillips v.

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[7] H.R. 8366 and H.R. 8614 were introduced on July 8 and July 14, 1975, respectively. On October 6, 1975, the Unemployment Compensation Subcommittee adopted a substitute proposal, H.R. 10210, which was ultimately enacted as the Unemployment Compensation Amendments of 1976, P.L. 94-566. U.S. Dep't of Labor, Employment & Training Admin., Unemp. Ins. Service, "Draft Language and Commentary to Implement Unemployment Compensation Amendments of 1976 - Public Law 94-566," at 81-85.

Martin-Marietta Corp., 400 U.S. 542 (1971), Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974), Geduldig v. Aiello, 417 U.S. 484 (1974), and that the propriety of including such a prohibition seemed so apparent that it did not require special mention. It may also be that the members of Congress were aware of the pendency of Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam) and were intending to address legislatively the problem raised in that case. Whatever the original impetus for including the pregnancy provision, after the opinion was rendered in the Turner case in November 1975, the rationale consistently proferred for the provision was that it would codify the result in Turner.

Turner involved a presumptive disqualification of pregnant UI claimants on the theory that they were unavailable for or unable to work. The per curiam decision of

the Court rejected this per se disqualification on a due process rationale, following its earlier decision in Cleveland Board of Educ. v. LaFleur, 414 U.S. 632. Thus, understandably, Congressional discussion focussed on the problem posed by presumptive disqualifications, a problem which affected the operation of numerous state UI systems.[8] For example, the Senate Report explained the pregnancy provision as follows:

> ...In a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits. In 1975 the Supreme Court found a provision of this type in the Utah unemployment compensation statute to be unconstitutional.... A number of other States have similar provisions .... The committee bill ... would prohibit States from continuing to enforce any provision

[8] The Department of Labor identified 19 states which had special pregnancy-related disqualification provisions. U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 33-75 (12/8/75), 1-B Unemp. Ins. Rep. (CCH) ¶21,482 (1976), at pp. 3796-98.

> which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.[9]

The House Report contains similar language, and is even more explicit on the intent to treat pregnant or formerly pregnant claimants like all other claimants:

> At the present time, 19 States have provisions which, in effect, deny benefits because of pregnancy. They vary from State to State, but they are all inequitable in that they deny benefits without regard to the woman's ability to work, availability for work or efforts to find work.
>
> Under eligibility provisions applicable to all claimants, including pregnant women, anyone who is physically unable to work or who is unavailable for work is ineligible for benefits. These determinations are made on the basis of the facts of each individual case and make discriminatory disqualifications

[9] S. Rep. No. 94-1265, 94th Cong., 2d Sess. 19-21 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6013-15 (emphasis added).

because of pregnancy unnecessary.[10]

This language from the House and Senate Reports makes it clear that legislative interest was focussed largely on presumptive disqualifications associated with pregnancy, such as the one at issue in Turner, and that the intent of the section was to eliminate these in favor of individualized determinations of eligibility, in which pregnant women would be required to satisfy all the regular criteria for receipt of UI benefits. Thus, there is no suggestion that women separated from work because of pregnancy would automatically receive benefits. To the contrary, Rep. Steiger specifically clarified:

> This does not mean that all pregnant unemployed women will automatically receive unemployment compensation benefits. It simply means that pregnant women will no longer be denied benefits solely on the basis of their pregnancy.
>
> If a pregnant woman is available for work, able to work, and cannot find a job, she ought to be treated no differently than any other unemployed individual available for work. That is what the provision in the bill seeks to accomplish.[11]

As evidenced in the cited language, the sponsors of the bill which would become §3304(a)(12) focussed their attention on the position of pregnant claimants who were denied benefits as a result of conclusive presumptions of ineligibility. Under the revised statute, these claimants were to be evaluated individually for a determination of eligibility. There is no record that the enacting Congress specifically contemplated the circumstances of formerly pregnant claimants or new mothers who, like Wimberly, returned to the workplace after a period of unavailability and inability to work

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[10] H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 50 (1975) (emphasis added).

[11] 122 Cong. Rec. 22,518 (1976) (emphasis added).

associated with pregnancy. However, the situation of this group is closely analogous to that of pregnant claimants, and Congress' clearly expressed intentions should control in both situations. Section 3304(a)(12) was intended to require states to treat pregnant claimants and new mothers in the same way that other unemployed persons were treated, with the recognition that this would leave all claimants subject to the same pre-existing, non-sex-based disqualifications.[12]

The Department of Labor has consistently supported this interpretation of the statute. Commenting on the new provision, DOL stated:

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[12] Other legislative proposals to limit disqualification in cases of voluntary termination of employment and misconduct were unsuccessful. For example, S. 2079, 94th Cong., 1st Sess., 121 Cong. Rec. 22,065 (1975), would have limited disqualification in such cases to six weeks; H.R. 2320, 94th Cong., 1st Sess., 121 Cong. Rec. 1703 (1975) would have prevented disqualification for short term (2 weeks or less) illness or impairment.

> It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether she meets the statute's conditions for receipt of benefits.[13]

Previously, DOL had interpreted the requirements imposed by the Turner decision in a similar fashion:

> [U]nder the principles of the Turner case, we believe a determination must be individualized; i.e. must be based upon "an individual woman's physical status," and not upon "an irrebuttable presumption of physical incompetency" derived from the mere fact of pregnancy.
>
> In our view, a determination disqualifying an individual from benefits when it is found that "her total or partial unemployment is due to pregnancy" is ... discriminatory.... A disqualification on the basis of such a provision would not be based on an individualized determination as to whether or not the individual was able to work, but

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[13] U.S. Dep't of Labor, Employment and Training Admin., Unemployment Ins. Service, "Draft Language and Commentary to Implement Unemployment Compensation Amendments of 1976 - Public Law 94-566", at 62.

only on the fact that her unemployment was due to pregnancy.[14]

DOL specifically rejected the notion that §3304(a)(12) required that pregnant claimants be treated more favorably than other claimants, a situation which it recognized would raise problems of discrimination. In Questions and Answers circulated to state UI administrators to assist them in the implementation of the 1976 Amendments, DOL stated:

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[14] U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 1-76 (2/4/76), 1-B Unempl. Ins. Rep. (CCH) ¶21,482 (1976). (Emphasis added.) The dissent in the Missouri Supreme Court wrongly cites this Program Letter as DOL's interpretation of §3304(a)(12). Pet. for Cert. at A17. This Program Letter is dated Feb. 4, 1976, while §3304(a)(12) was not enacted until Oct. 20, 1976. Moreover, the Program Letter states at the outset that its purpose is "[t]o inform the States of the U.S. Supreme Court's decision in the Turner case...." The dissent below also incorrectly interpreted the Program Letter to support the view that any woman whose "total or partial unemployment is due to pregnancy" is entitled to UI benefits automatically. However, the Program Letter addressed two separate provisions of Utah law relating to pregnant claimants and concluded that both conflicted with Turner, because neither provided for individualized determinations of eligibility.

2. Question:

Does the amendment to section 3304(a)(12) relating to pregnancy prohibit a State from treating a pregnant claimant more favorably than other claimants?

Answer:

No. Section 3304(a)(12) of FUTA has been amended to require that no person be denied benefits under State law or policy on the basis of pregnancy or termination of pregnancy.... The new amendment does not speak to treating pregnant claimants more favorably. It only requires that they not be disqualified solely on the basis of pregnancy or its termination No issue under 3304(a)(12) would be raised if a State chooses to treat pregnant claimants more favorably than other claimants, but it seems likely that more favorable treatment of a specific class of women might well raise other issues grounded on discrimination.[15]

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[15] U.S. Dep't of Labor, Employment and Training Admin., Unemployment Ins. Service, "Supplement #1 - Questions and Answers Supplementing Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - P.L. 94-566," (12/7/76) at 26 (emphasis added).

This Q and A makes unequivocal DOL's understanding that §3304(a)(12) was not intended to require preferential treatment of pregnant (or recently pregnant) claimants, and that such an approach might involve discrimination.[16] DOL's contemporaneous and consistently followed interpretation is entitled to judicial respect and deference, Chevron v. Natural Resources Defense Council, 467 U.S. ___, 81 L.Ed. 2d 694 (1983),

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16 DOL apparently thought that a pregnancy-based preference might constitute unlawful discrimination under the standard set out in Geduldig v. Aiello, 417 U.S. 484. Because we contend that the statute clearly did not authorize a pregnancy-based preference, and because we submit that §3304(a)(12) must be construed harmoniously with Title VII, see n.21, infra, we do not believe that this constitutional issue can or should be addressed in this case. As stated in the ACLU Brief, Amici Curiae, in Cal Fed at 37, n.51, we question the continuing vitality of Geduldig. Regardless of the standard applied, a pregnancy-based classification in this case would be inappropriate since a neutral rule granting benefits to any employee terminated from employment because of temporary physical incapacity would serve the state's interest equally well.

especially since it is the only interpretation fully consistent with the legislative history.[17]

In the courts below, Wimberly argued that §3304(a)(12) was intended to eliminate two different kinds of discrimination. In addition to blanket disqualifications, she asserted it was directed at provisions which "disqualify a claimant because she left work on account of her condition or because her unemployment is a result of pregnancy." This language appears in the House Report on H.R. 10210 and reads in full:

> Nineteen States have special disqualification provisions pertaining to pregnancy. Several of these provisions hold pregnant women unable to work and unavailable for work; the remainder disqualify a claimant because she left work

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17 For a similar interpretation of the statute, see also Dahm and Fineshriber, "Administration of the Pregnancy Standard," in National Commission on Unemployment Compensation, Unemployment Compensation: Studies and Research (July 1980) 41, 45.

> on account of her condition or because her unemployment is a result of pregnancy.[18]

The Report does not indicate which nineteen states it referred to, or where that figure came from. However, it is probably not coincidental that one week before this Report was issued, DOL issued a Program Letter entitled "Summary of Discriminatory State Provisions Relating to Pregnancy, Domestic and Marital Obligations and Dependants' Allowances," in which it identified nineteen states whose laws contained specific provisions relating to pregnancy.[19] All of these provisions contained blanket disqualifications, some of which presumed pregnant women unable to work or unavailable for work, and others which operated without

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[18] H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 7 (1975) (emphasis added).

[19] U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 35-75 (12/8/75), 1-B Unempl. Ins.Rep. (CCH) ¶21,482 (1976), at p.3796.

regard to those particular presumptions.[20] Congressional reference to all of these provisions collectively as "special disqualification provisions pertaining to pregnancy" displays the Congressional intent, subsequently described by DOL, to eradicate blanket pregnancy-related disqualifications in favor of individualized determinations, rather than to create a special category for pregnant women.

II. §3304(a)(12) PROSCRIBES BOTH OVERT AND COVERT FORMS OF INTENTIONAL DISCRIMINATION

The conclusion that §3304(a)(12) requires that pregnant claimants and new mothers not be subject to any presumptive or blanket disqualifications, but that they be

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[20] For example, Utah rendered women "ineligible for any week of unemployment due to pregnancy." Id. at p.3798. As noted in a subsequent Program Letter, See n. 14, supra, DOL interpreted this provision as a blanket or presumptive disqualifier because the fact of pregnancy alone rendered a woman ineligible for benefits.

treated like other claimants with regard to eligibility criteria, does not end the inquiry in this case but simply refocusses it. For the injunctive against discrimination "solely on the basis of pregnancy" is not confined to state rules which openly disqualify all pregnant claimants but would also prohibit, at a minimum, other forms of intentional discrimination.[21]

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[21] While it is not clear whether receipt of UI benefits constitutes a term, condition, or privilege of employment within the meaning of Title VII, compare Vick v. Texas, 514 F.2d 734 (5th Cir. 1975) with Barone v. Hackett, 602 F.Supp. 481 (D.R.I. 1984) and cases cited therein, employers' conduct with regard to layoff, termination, fringe benefits and other aspects of employment frequently implicates the rights and obligations created by both statutes. For example, if an employer discriminatorily fires an employee, but claims that the employee's own misconduct caused the termination, the employee's rights under both statutes would be affected. It is thus particularly important that these two statutes be construed harmoniously. In the present case, this suggests that §3304(a)(12)'s prohibition on pregnancy-based discrimination should be read consistently with the same prohibition contained in Title VII. Cf. Ammans v. Zia Company, 448 F.2d 117 (10th Cir. 1971), Shultz v. Wheaton Glass Company, 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970), Hodgson v. Brookhaven Gen'l Hosp., 436 F.2d 719 (5th Cir. 1970) (Title VII and the Equal
(footnote cont'd)

Intentional discrimination against pregnant women and new mothers can occur even in states which do not impose blanket disqualifications. In New York, for example, an alleged practice to scrutinize the claims of pregnant women more carefully was the subject of a lawsuit, which was settled on terms requiring UI officials to notify pregnant claimants of their rights and prohibiting officials from treating pregnant claimants differently from others. Feehan v. Levine, 75 Civ. 3717 (S.D.N.Y.). The State in that case imposed no blanket disqualifications on pregnant women, but simply found them unavailable for work because employers did not wish to hire them,[22] allegedly assigned

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Pay Act should be harmoniously construed, as both represent Congressional attempts to eliminate sex discrimination in employment).

[22] See,e.g., In re Feehan, Referee #73-51705 (N.Y. Dep't of Labor, Unemployment Ins. Referee Section Jan. 8, 1974), aff'd, Appeal #194,372 (Review Bd. July 26, 1974), In re Carr, Referee #74-27748 (N.Y. Dep't of Labor, Unemployment Ins. Referee Section Sept. 17,
(footnote cont'd)

their claims to a special section, subjected them to more thorough review, and denied them benefits more often. Feehan v. Levine, 11 Empl. Prac. Dec. (CCH) ¶10,773 (S.D.N.Y. 1976) (granting class action status).[23]

Similarly, an action in Connecticut alleged that the state discriminated against pregnant women and new mothers by harassing them, requiring them to wait inordinately long periods of time, refusing to refer pregnant women for job interviews, inquiring

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1974), aff'd Appeal #200,466 (Review Bd. Oct. 21, 1974).

[23] Although this case was settled in 1978, enforcement problems persist. On June 23, 1986, counsel to amici curiae herein, also counsel to the plaintiffs in Feehan, received a complaint from a pregnant woman that she had been harassed, intimidated, and refused the right to file a claim by the supervisor of a local UI office. He reportedly pulled her out of line and, without inquiring into her efforts to find work, told her that she was "not marketable," and that she was not really able to work or available for work. This conduct directly violates the internal procedures developed pursuant to the Feehan Order which state, inter alia, that "it is the claimant's willingness to work and not the willingness to hire that is the test." Order filed April 6, 1978, Exh.2, p.2.

about childcare arrangements and requiring written statements from childcare providers as an element of proving availability for work, and the like. State of Connecticut National Organization for Women v. Peraro, (D. Conn., Civ. Ac. No. N77-477) Complaint, ¶'s 20-29 (12/5/77). This case was also settled by entry of an Order requiring that pregnant claimants and new mothers be treated like other claimants. Id., 1-B Unempl.Ins.Rep. (CCH) ¶21,593 (D. Conn. 1980).

In the above examples, intentional discrimination operated against pregnant women and new mothers to deny them UI benefits in violation of the principles established in Turner. Other forms of intentional discrimination would include, for example, discriminatory denial of reinstatement after pregnancy leave. Discrimination against new mothers persists and is

frequently manifested in the denial of reinstatement.[24]

The case of Pennington v. Lexington School District 2, 518 F.2d 546 (4th Cir. 1978) is illustrative. The school board in that case had a facially non-discriminatory policy to terminate any teacher absent for 20 consecutive school days, neither guaranteeing nor precluding reinstatement. The evidence disclosed that teachers who were absent for more than 20 days because of sickness were reinstated when their health permitted, while teachers on pregnancy leave were generally required to wait until the beginning of the following academic year. See, also, Allen v. County of Montgomery, ___ F.2d ___, 40 Fair Empl. Prac. Cas. (BNA) 1278, 1281 (11th Cir. 1986), King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984), In re Southwestern Bell Tel. Co. Maternity Benefits Litigation, 602 F.2d 845 (8th Cir. 1979), Communications Workers v. Illinois Bell Tel. Co., 509 F.Supp. 6 (N.D. Ill. 1980). Such practices in turn may well be a major cause for the discriminatory denial of UI benefits.[25]

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24 See, e.g., Stacy v. Michigan Employment Security Commission, 26 Empl. Prac. Dec. (CCH) ¶32,007 (W.D. Mich. 1980) (plaintiff alleged that employer reinstatement policy returns males on leaves to original positions while only offering plaintiff returning from mandatory pregnancy leave reinstatement to a lesser position); Clanton v. Orleans Parish School Board, 649 F.2d 1084 (5th Cir. 1981) (early return from mandatory maternity leave discretionary and routinely denied during a period of student attrition while those on sick leave had right to return).

In earlier cases, like Phillips v. Martin-Marietta Corp., 400 U.S. 542, the bias was overt. More recently, it has become clear that assumptions that women have primary responsibility for and allegiance to domestic responsibilities continue subtly to affect employment decisions. See, National Academy of Sciences, National Research Council, Women's Work, Men's Work (B. Reskin, H. Hartmann, eds.) (1986) at 38-44; N. Taub, Keeping Women in Their Place: Stereotyping Per Se As a Form of Employment Discrimination, 21 B.C.L. Rev. 345, 353-60 (1980).

25 If states simply assume that employer discretion in granting reinstatement is exercised fairly, women may appear to be denied benefits because of application of a neutral rule, when in fact they are the victims of (footnote cont'd)

Other employers discriminate by placing time limits on pregnancy leave, although other leaves are not similarly limited. See Maddox v. Grandview Care Center Inc., 780 F.2d 987 (11th Cir. 1986); Zichy v. City of Philadelphia, 476 F.Supp. 708 (E.D. Pa. 1979). If a woman employee in this situation is fired for overstaying her pregnancy leave and applies for UI benefits, her claim would be denied on the grounds that her termination was "for cause" unless the UI official inquired into the administration of other leave provisions sufficiently to discern that intentional discrimination, not misconduct, caused her dismissal.

Unequal application of UI eligibility

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intentional discrimination, caused by the employer and implemented by the state. Cf. Maddox v. Grandview Care Center Inc., 780 F.2d 987 (11th Cir. 1986) where the Court of Appeals noted that "[t]he district court specifically held that [the employer's] contention that the policy was not facially discriminatory was 'not credible in light of the actual application of those policies.'" Id. at 991.

criteria has traditionally resulted in intentional discrimination. The "voluntary quit" disqualification in some jurisdictions has barred women separated from work because of pregnancy but not men separated from work because of other "personal" or "voluntary" activities. For example, in Louisiana men who were fired when incarcerated[26] were found eligible for UI benefits, as was a man who stayed home to care for his pregnant wife,[27] while women whose pregnancies required leaves of absence were denied benefits because their separations were deemed "voluntary" quits.[28] In New Mexico, a male laborer who limited his

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[26] Smith v. Admr., 5 Unempl. Ins. Rep. (CCH) ¶1975.163 (La. Ct. App. 1962); Schoennagel v. La. OES, 413 So.2d 652 (La. Ct. App. 1982). In Smith, the employee was jailed for failing to pay child support.

[27] Piirainen v. Admr., 5 Unempl. Ins. Rep. (CCH) ¶1975.1631 (La. Dist. Ct. 1963).

[28] Olin Mathieson Chemical Corp. v. Admr., 188 So.2d 157 (La. Ct. App. 1966) and South Central Bell Tel. Co. v. DES, 389 So.2d 790 (La. Ct. App. 1980).

job search to union referrals was held available for work and entitled to UI benefits. His unemployment was deemed the result of poor economic conditions[29], while a pregnant claimant who was terminated as a result of a mandatory leave policy was deemed unavailable for work because of the reluctance of employers to hire her. The UI official held that "...[r]esistance to hiring is considered a restriction on availability of the individual who is in an advanced state of pregnancy...."; [30] Michigan courts have also used the "voluntary quit" rationale to deny UI benefits to women temporarily incapacitated as a result of pregnancy[31] while

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29 App. Ref. Dec. No. 452-67-U, 8 Unempl. Prac. Dec. (CCH) ¶8173 (N.M. June 23, 1967).

30 App. Ref. Dec. No. 444-UCFE, 8 Unempl. Prac. Dec. (CCH) ¶8164.09 (N.M. Sept. 4, 1964), aff'd Comm. Dec. No. 516 (N.M. Dec. 9, 1964).

31 Watson v. Murdock's Food and Wet Goods, 6 Unempl. Ins. Rep. (CCH) ¶9896 (Mich. Ct. App. Jan. 4, 1986).

not applying the same theory to others whose physical conditions made them unable to work.[32]

§3304(a)(12) was surely intended, at a minimum, to prohibit these forms of intentional pregnancy-based discrimination. The statute requires the states to do more than simply refrain from mentioning pregnancy specifically in formal written rules and procedures. By the time §3304(a)(12) was enacted, it was well-recognized that intentional discrimination exists in many forms, and that covert discrimination had become a more pervasive problem than overt bias.[33]

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32 See Glowacz v. Archdiocese of Detroit, 6 Unempl. Ins. Rep. (CCH) ¶9854.16 (Mich. Cir. Ct., May 21, 1984) (elderly cook no longer physically able to perform work duties deemed an involuntary quit) and Wenting Building & Manufacturing Co. v. Wright, 6 Unempl. Ins. Rep. (CCH) ¶9057 (Mich. Cir. Ct., Jan. 29, 1965) (claimant with physical reaction to child's death considered an involuntary quit).

33 For example, the debates over the Pregnancy Discrimination Act amending Title VII revealed the appreciation in Congress of the pervasiveness of (footnote cont'd)

Missouri apparently makes no effort to discern veiled acts of intentional discrimination (and may in fact compound them by their own practices).[34] Unless an employer volunteers that it has treated a pregnant woman unfavorably, Missouri officials apparently assume, as in this case, that her separation from work was not attributable to her employer, and that the employer's policy not to guarantee reinstatement is applied even-handedly. But there is no reason why an employer who has denied reinstatement to a new mother who is willing and able to work should enjoy such a presumption of non-

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covert, intentional discrimination based on pregnancy. "[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 (1977).

[34] If women who are discriminated against in the workplace are also denied unemployment compensation, ostensibly because they left work "voluntarily" or "without good cause" or "without cause attributable to the workplace or the employer," the discrimination is compounded and the state has become a party to it.

discrimination. In fact, just the opposite is true. Given the prevalence and persistence of various forms of sex discrimination, the failure to reinstate a new mother who is actively seeking work should be enough to raise a question whether sex discrimination was involved.

It would be simple for Missouri and other states to effectuate Congressional intent underlying §3304(a)(12). In situations like the present case, the employer should be required to show that its non-return policy was actually applied as stated, i.e., that reinstatement was not guaranteed and was in fact granted or denied without regard to pregnancy or motherhood. Where the entire basis for disqualification rests on the employer's characterization of its reinstatement policy, it is reasonable to require the employer to substantiate its position with some evidentiary showing.

CONCLUSION

For the foregoing reasons, the Court should remand this case for a determination whether intentional discrimination on the basis of pregnancy or termination of pregnancy by either the employer or the State operated in any way to deny petitioner unemployment insurance benefits in contravention of 26 U.S.C. §3304(a)(12).

Respectfully submitted,

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